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In the Supreme Court of the United States

OCTOBER TERM, 1980

SHEILA RENDELL-BAKER,
PETITIONER,

v.

SANDRA KOHN, ET AL.,
RESPONDENTS,

WAYNE KLUG, ET AL.,
PETITIONERS,

v.

NEW PERSPECTIVES SCHOOL, INC., ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Is an ostensibly private school, to which local governments have delegated their statutory obligation to provide public education to special needs children at public expense and which is subject to extensive state regulation, subject to any constitutional constraints in connection with the provision of such education?

PARTIES BELOW

The Court of Appeals for the First Circuit consolidated these two appeals from the District Court for the District of Massachusetts. In No. 80-1328 below, the plaintiff-appellant was Sheila Rendell-Baker; the defendants-appellees were New Perspectives School, Inc., Sandra Kohn (individually and as director of the school), the members of the Board of Directors of the school (individually and in their official capacities),[1] Francis X. Bellotti (as Chairman of the Massachusetts Committee on Criminal Justice), and

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[1]The individual members of the school's Board of Directors named in the Rendell-Baker Complaint were Susan Alford, John Businger, Jackie W. Cooper, Stephen B. Goldenberg, Rodney Jackson, Joanne Neiman, James W. Schlesinger, Rina Wald Spence, Tonia Yee, and Edward Zarsky.

William Highgas[2] (as Executive Director of the Massachusetts Committee on Criminal Justice). In No. 80-1451 below, the plaintiffs-appellees were Wayne Klug, Carolyn Anderson, Paul Stein, William Tilden, and Dawn Fonseca; the defendants-appellants were New Perspectives School, Inc., Sandra Kohn (individually and as director of the school), and the members of the Board of Directors of the school (individually and in their official capacities).[3]

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[2]William Highgas was substituted as a named party after he succeeded Robert J. Kane, who was originally named in the Complaint, as Executive Director of the Commonwealth of Massachusetts Committee on Criminal Justice.

[3]The individual members of the School's Board of Directors named in the Klug complaint were James W. Schlesinger, Stephen B. Goldenberg, Joseph Gartner, Joanne Neiman, David Bachrach, Rodney Jackson, Rita Wald Spence, Susan Alford, Rhoda Goodwin, Rita Hamberg, Tonia Yee, and Edward Zarsky.

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OPINIONS BELOW

The opinion of the court of appeals for both cases, as consolidated on appeal, is reported at 641 F.2d 14 (1st Cir. 1981) and appears in the Appendix hereto at 1. The Memorandum and Order of the District Court for the District of Massachusetts in Rendell-Baker v. Kohn, et al., No. 80-1328 below, is reported at 488 F. Supp. 764 (D. Mass. 1980) and appears in the Appendix hereto at 27. The April 7, 1980 Memorandum and Order of the District Court for the District of Massachusetts in Klug, et al. v. New Perspectives School, Inc., et al., No. 80-1451 below, is not reported and appears in the Appendix hereto at 39.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered in both appeals below on February 12, 1981. On May 4, 1981, this Court granted the petitioners' motion for an extension of time until June 12, 1981, within which to petition for certiorari. See 28 U.S.C.A. § 2101(c) (West 1958). This petition was filed on or before June 12, 1981. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1254(1) (West 1966).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law ... abridging the freedom of speech ....

United States Constitution, Amendment V:

> No person shall ... be deprived of life, liberty, or property, without due process of law ....

United States Constitution, Amendment XIV:

> Section 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code Annotated, Title 42, Section 1983 (West Supp. 1981):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be

liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Mass. Gen. Laws Ann., ch. 71B, § 3 (West Supp. 1981):

> ... [T]he school committee of every city, town or school district shall identify the school age children residing therein who have special needs, diagnose and evaluate the needs of such children, propose a special education program to meet those needs, provide or arrange for the provision of such special education program, maintain a record of such identification, diagnosis, proposal and program actually provided ....

Mass. Gen. Laws Ann., ch. 71B, § 4 (West Supp. 1981):

> The school committee of any city, town or school district may, to meet its obligations under section three, ... subject to the consent of the parent or guardian affected thereby and subject to constitutional limitations, ... enter into an agreement with any public or private school, agency, or institution to provide the necessary special education within the city, town or school district.

Mass. Gen. Laws Ann., ch. 71B, § 5 (West Supp. 1981):

Any school committee which provides or arranges for the provision of special education pursuant to the provisions of section three shall pay for such special education personnel, materials and equipment, tuition, room and board, transportation, rent and consultant services as are necessary for the provision of such special education.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

SHEILA RENDELL-BAKER,

Petitioner,

v.

SANDRA KOHN, ET AL.,

Respondents.

Petition For a Writ of Certiorari
to the United States Court of
Appeals for the First Circuit

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in the above-entitled case on February 12, 1981.

STATEMENT OF THE CASE

This petition for a writ of certiorari concerns two cases which involve closely related issues and which were consolidated on appeal by the United States Court of Appeals for the First Circuit.

Petitioner in the first case is Sheila Rendell-Baker, a former teacher and vocational counselor at the New Perspectives School, Inc. (hereinafter the "School"), one of the respondents herein. Ms. Rendell-Baker filed her complaint on July 28, 1977. She alleged, among other things, that the School, acting under color of state law and in violation of her rights under the First, Fifth, and Fourteenth Amendments and 42 U.S.C.A. § 1983

(West Supp. 1981), dismissed her on January 3, 1977, without notice or hearing, in retaliation for her speech in support of a student petition concerning matters of school policy. Also named as defendants were members of the School's Board of Directors; Francis X. Bellotti,[4] in his capacity as Chairman of the Massachusetts Committee on Criminal Justice (hereinafter "MCCJ");[5] Robert J. Kane, former Executive Director of MCCJ;[6] and certain federal officials, in their capacity as

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[4]Mr. Bellotti is also Attorney General of the Commonwealth of Massachusetts.

[5]The MCCJ is a state agency which, among its other duties, distributes funds received from the federal Law Enforcement Assistance Administration. Mass. Gen. Laws Ann. ch. 6, § 156 (West 1976 & Supp. 1981).

[6]While the case was pending in the district court, Mr. William Highgas replaced Mr. Kane as Executive Director and was duly substituted as a defendant.

officials of the Law Enforcement Assistance Administration (hereinafter "LEAA").[7] Jurisdiction was invoked pursuant to 28 U.S.C.A. §§ 1331, 1343, and 1361 (West Supp. 1980, 1976 & 1976). On April 16, 1980, the district court (Caffrey, C.J.) granted summary judgment in favor of all defendants, on the ground that the School's dismissal of Ms. Rendell-Baker did not involve state action. Summary judgment was affirmed by the United States Court of Appeals for the First Circuit in an opinion dated February 12, 1981.

Petitioners in the second case are five former teachers and counselors[8] at

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[7]The federal defendants were dismissed by order of the district court, and petitioners herein do not challenge that dismissal.

[8]Petitioners are Wayne Klug, Carolyn Anderson, Paul Stein, William Tilden, and Dawn Fonseca.

the School. These five petitioners also claim that they were dismissed, in June, 1978, for their support of student speech and educational rights and for their other speech critical of school policy and administration, all in violation of their rights under the First, Fifth, and Fourteenth Amendments and 42 U.S.C.A. § 1983 (West Supp. 1981). Suit was commenced against the School and each of its directors on September 12, 1978. Jurisdiction was invoked pursuant to 28 U.S.C.A. §§ 1331, 1343, and 1361 (West Supp. 1980, 1976 & 1976). On April 7, 1980, the district court (Mazzone, D.J.) denied defendants' motion to dismiss, holding that there was "sufficient involvement by the state to meet the jurisdictional challenge...." (App. 54) The First Circuit Court of Appeals granted

leave to file an interlocutory appeal under 28 U.S.C.A. § 1292 (b) (West 1966) and consolidated the Klug appeal with the Rendell-Baker appeal. In the same opinion that affirmed the judgment in Rendell-Baker, the court of appeals reversed the order denying defendants' motion to dismiss in Klug, with directions that judgment be entered dismissing the complaint.

To understand the nature of the petitioners' claims that the School acted "under color of state law" when it dismissed them for their speech, one must recognize the vital role of the School in the provision of public education under Massachusetts law. Under Massachusetts law, all special needs students have an entitlement to a publicly-funded education under the supervision of the state and local governments. As the Massachusetts

Supreme Judicial Court reaffirmed recently, Chapter 766 of the Massachusetts Acts of 1972, codified at Mass. Gen. Laws Ann. ch. 71B (West Supp. 1981), and the regulations promulgated thereunder, 603 Code Mass. Regs. § 28 et seq. (1979), create "a comprehensive and complete program of evaluation and placement for children with special education needs." Commonwealth v. School Committee of Springfield, Mass. Adv. Sh. [1981] 502, 504, 417 N.E.2d 408, 409-10, quoting Board of Education v. Assessor of Worcester, 368 Mass. 511, 515, 333 N.E.2d 450, 453 (1975).

Under the statute, the school committee of every city, town or school district must identify all children between the ages of three and twenty-one who, because of temporary or permanent

physical or emotional disability, have special educational needs; diagnose and evaluate the special needs of each such child; prepare an individualized educational program tailored to meet those needs; and implement or arrange for the implementation of that individualized program. Mass. Gen. Laws Ann. ch. 71B, § 3 (West Supp. 1981). Depending upon the needs of the child, the program may consist of as little as additional, in-class assistance or as much as teaching, treatment, and occupational training in a long-term residential school. Mass. Gen. Laws Ann. ch. 71B, § 2 (West Supp. 1981). School districts may offer special programs themselves, through existing public schools, or they may contract with private schools to implement such programs. Mass. Gen. Laws Ann. ch. 71B, § 4 (West Supp.

1981). However, under the regulations, the school district must provide special education programs in the least restrictive environment possible. 603 Code Mass. Regs. § 28, ch. 3, par. 322.2 (1979). "The statute impliedly requires, and the regulations explicitly mandate, public school education to the maximum extent possible; private school placements are permitted only as a necessary alternative." Commonwealth v. School Committee of Springfield, Mass. Adv. Sh. [1981] at 505-506, 417 N.E.2d at 408.

If the school committee decides to place the special needs child in a private school, there must be a review of that decision at least once every three months to determine if the child can be transferred to a less restrictive environment, such as a regular public school. 603 Code

Mass. Regs. § 28, ch. 3, pars. 502.4(c), 804.2 (1979). While the child is at a private school, the school committee must monitor the child's educational progress, Mass. Gen. Laws Ann. ch. 71B, §§ 2, 3 (West Supp. 1981), with a view toward returning the child to a regular course of instruction in a public school as soon as possible. Id. A private school which accepts a special needs child assigned by a school committee is required to agree to implement the special educational program designed for the child and to comply with the detailed regulations promulgated under the statute. 603 Code Mass. Regs. § 28, ch. 3, pars. 804.0-804.6 (1979). The school committee of the city, town or school district which assigns a special needs child to a private school is required to bear the expenses associated

with that placement. Mass. Gen. Laws Ann. ch. 71B, § 5 (West Supp. 1981). In no event may a parent or guardian be charged for the provision of a special education program to a child. Mass. Gen. Laws Ann. ch. 71B, § 10 (West Supp. 1981).

Against this background the petitioners herein assert that the School acted under color of state law when it dismissed them from their positions as teachers and counselors for supporting student rights and criticizing school policies and administration. The School is a small non-profit institution which provides a high school program to approximately 50 students who are unable to function in a normal high school setting. It is located on privately-owned

land in the Town of Brookline, Massachusetts, and is organized under the laws of the Commonwealth of Massachusetts. Operation of the School is under the control of a Board of Directors, none of whose members is a government official or appointed by a governmental body.

As of 1978, all 50 students enrolled at the School had alcohol, drug or behavioral problems or other special needs, and had been placed in the School pursuant to Mass. Gen. Laws Ann. ch. 71B by the Town of Brookline or the City of Boston, or by the Drug Rehabilitation Division of the Massachusetts Department of Mental Health. All were attending on a tuition-free basis. The students received a diploma certified by the Town of Brookline School Committee upon graduation. The Town of Brookline

maintained no suitable facilities for educating these students within its traditional public schools.[9]

In fiscal year 1975-76, 91% of the School's funding came from public sources. In fiscal year 1976-77, public sources accounted for 99% of the School's funds. A portion of these funds was provided by the LEAA under a grant which was channeled to the School through the MCCJ. The grant was to fund a vocational counseling and placement program at the School during the years 1976 and 1977. Ms. Rendell-Baker's position was funded by this grant.

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[9]Although the court of appeals found no support in the record for this assertion, 641 F.2d at 17, n.2 (App. 3-4, n.2), the affidavit of Wayne Klug, which was a part of the record below, stated, at paragraph 3: "The Town of Brookline, from which a large number of the School's students come, has no educational programs which can meet the special needs of the students which it refers to the School, within its public school system."

On December 2, 1976, students at the School petitioned its Board of Directors seeking reinstitution of the prior role played by the Student-Staff Council in personnel decisions at the School. Ms. Rendell-Baker spoke in favor of the student petition, which was opposed by the School's Director, Sandra Kohn. On January 3, 1977, according to the complaint, Ms. Kohn fired Ms. Rendell-Baker for expressing an opinion contrary to her own. Before notifying Ms. Rendell-Baker that she was to be discharged, Ms. Kohn advised the MCCJ of her intentions. After the dismissal, the MCCJ advised the School that it would not approve the hiring of a replacement for Ms. Rendell-Baker until the School provided a satisfactory explanation to the MCCJ for the

dismissal. The School provided an explanation and, by letter to the School dated March 29, 1977, the MCCJ indicated its satisfaction with that explanation. Ms. Rendell-Baker filed suit a few months later.

The dismissals in the Klug case occurred in June, 1978, shortly after petitioners had complained privately to the School's Board of Directors and publicly in a letter to the Brookline Chronicle about certain aspects of the School and its administration. The criticism which led to the dismissals in the Klug case, like that in the Rendell-Baker case, related directly to the performance by the School of its duties as a provider of educational services under Mass. Gen. Laws Ann. ch. 71B.

As noted, the Court of Appeals for the First Circuit held that the School did not act under color of state law in discharging the petitioners. Accordingly, it affirmed summary judgment in favor of defendants in Rendell-Baker and reversed the order denying defendants' motion to dismiss in Klug.

REASONS FOR GRANTING THE WRIT

This petition for a writ of certiorari should be allowed because the court of appeals decided an important question of federal law which has not been, but should be, settled by the Supreme Court. Also, to the extent this Court and other federal courts have addressed related questions, the decisions have conflicted, in principle, with the decision of the court of appeals in this case.

1. This Case Presents an Important, Unsettled Question of Federal Law.

In recent years, this Court has often addressed the question of whether conduct of an ostensibly private institution could be attributed to the state. E.g., Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Evans v. Newton, 382 U.S. 296 (1966); Moose Lodge No. 107 v. Irvis, 407

U.S. 163 (1972); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978). However, the present case raises an important federal question which does not appear to have been addressed. That question is whether an ostensibly private school becomes subject to any constitutional constraints when it accepts the delegation of a major portion of the state's statutory obligation to provide public education. A review of this Court's prior "state action" decisions will assist in an appreciation of the novelty of this question. A brief discussion of the increasingly important role which private schools have come to play in the provision of public education, in Massachusetts and elsewhere, under statutes like Mass. Gen. Laws Ann. ch.

71B will assist in an appreciation of the question's significance.

A. The Question Presented is Unsettled.

To place the following review of prior cases in context, it should be emphasized at the outset that this case does not raise the broader question whether elementary and high school education is so inherently affected with a public interest that all private schools which provide such education should be held to the same constitutional standards as public schools. The point which distinguishes the present case is that the private school involved here was providing public, not private, education, in the sense that students who attended the School had been placed there by a state agency and local school committees to obtain, at public expense and subject to

public regulation and oversight, the education to which they were entitled under state law. See, e.g., Commonwealth v. School Committee of Springfield, Mass. Adv. Sh. [1981] 502, 515, 417 N.E.2d 408, 415 ("The statute's purpose is, primarily, to help specified children with special needs obtain the education which is theirs by right.").

It should also be emphasized at the outset that the present case does not raise the question whether a private school becomes a state actor for all purposes when local governments delegate to it their obligation to provide public education. The present case raises only the question whether the private school becomes a state actor in connection with activities directly related to the manner in which it performs that delegated

function. For example, a school could be acting under color of law in dismissing teachers for criticizing educational policy and not be acting under color of law in dismissing teachers for complaining about the inadequacy of the school's parking facilities, since the adequacy of a school's parking facilities bears little, if any, relationship to the provision of public education by the school.

Finally, it should be emphasized that the present case does not raise the question whether the activities of a private entity become infused with state action whenever the private entity receives public funds or is subject to public regulation, or both. Again, the overriding factor which distinguishes the present case is that the private school here is not only publicly funded and regulated,

but it has assumed the local government's own obligation to provide public education at public expense to the students assigned to the school by a state agency and local school committees.

A review of leading Supreme Court cases in this area quickly reveals that none has dealt directly with the important question presented in this case. For example, the question presented in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), was whether the state had become so involved in the affairs of a private entity that the activities of the private entity became imbued with state action. After a thorough sifting of the facts and circumstances, the Court concluded that the state parking authority had so insinuated itself into the private business affairs of its restaurant lessee

that the discriminatory practices of the restaurant could fairly be attributed to the state. The present case essentially raises the converse question: May the state, by paying a private contractor to provide a public service which the state would otherwise be required to provide, so disassociate itself from the provision of that public service that the private entity to which the state delegates authority avoids all constitutional scrutiny of the manner in which it provides that service?

This distinction has great significance. When, as in Burton, the question is whether the state has so far insinuated itself into private conduct that the private conduct becomes, in effect, the conduct of the state, the more the state intrudes, through regulation or subsidy,

the more appropriate it is to find state action. It is therefore not at all surprising, in light of cases such as Burton, that lower federal courts, in evaluating allegations of state action, routinely analyze the extent and depth of the state's involvement in the private conduct. See, e.g., Downs v. Sawtelle, 574 F.2d 1, 6-8 (1st Cir.), cert. denied, 439 U.S. 910 (1978); Braden v. University of Pittsburgh, 552 F.2d 948, 958-62 (3d Cir. 1977); Berrios v. Inter American University, 535 F.2d 1330, 1332 (1st Cir. 1976); Weise v. Syracuse University, 522 F.2d 397, 406-08 (2d Cir. 1975); Cohen v. Illinois Institute of Technology, 524 F.2d 818, 824-27 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976). Such a mode of analysis is simply inadequate, however, when the governmental entity has not

insinuated itself into private affairs but rather has attempted to shed authority and responsibility by paying others to perform tasks which it would otherwise be obligated to perform. To say that there is no state action under such circumstances because there is little or no state involvement in the way the private contractor exercises the authority delegated to it by the state is to beg the question.

Apparently, however, the First Circuit failed to appreciate this distinction because it mistakenly employed a mode of analysis more suited to a Burton type "insinuation" case than to the "delegation" case before it. Thus, the court stated that in order "to find that an otherwise privately operated institution is so dominated by the state that all its actions occur 'under color of state law,'

we must find that the state actually does control the institution, not just that it could do so." 641 F.2d at 25 (App. 19). In the same vein, the court stated:

> For purposes of this case, it is particularly important that none of the state agencies involved has undertaken to regulate the school's personnel policies, except to require that its policies be set forth in writing. The content of the school's personnel policies, including criteria and procedures for hiring and firing, has been left to the discretion of the school's management. Id. (App. 20-21) (Footnote omitted).

This passage demonstrates the fundamental error in the First Circuit's analysis. When, as here, the case concerns the state's delegation of its statutory duties to a private entity, the fact that there has been a total rather than a partial abdication of authority should not be a basis for rejecting a claim of state action.

In some respects, Evans v. Newton, 382 U.S. 296 (1966), came closer to addressing the question presented in the case at bar. There, the City of Macon, Georgia, attempted to resign as trustee of a park established under the will of Senator Bacon so that private trustees, who were expected to continue operating the park as a segregated facility, could be appointed. The Supreme Court reversed a state court judgment which would have permitted such substitution. The Court stated:

> [W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations. 382 U.S. at 299.[10]

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[10]The Court noted, however, that a private entity such as a school does not assume all the

(Footnote 10 continued on next page)

Although this principle certainly appears applicable here, the peculiar fact situation in Newton has generated some uncertainty as to the scope of the decision.[11] Thus, in the present case, the First Circuit construed Newton as standing for the narrow proposition that a state may not create a "sham private entity," 641 F.2d at 24 (App. 17), for the "actual purpose of evading constitutional requirements."

(Footnote 10 continued from previous page)

constitutional obligations of the state just because it performs the parallel function of providing private education. 382 U.S. at 300. The present case raises the very different issue of whether a private school which is paid by an arm of the state to provide public education thereby assumes the constitutional obligations of the state in connection with its provision of such public education.

[11] This Court itself has stated that ". . . Newton rests on a finding of ordinary state action under extraordinary circumstances." Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 159, n.8 (1978).

Id. at 23 (App. 16). Because of this uncertainty, Newton did not settle the question presented here.

Newton also left the question unsettled because it concerned the extent to which the state had insinuated itself into a facility whose origin was private, not public. As Justice Harlan noted in dissent: "Beaconsfield had its origin not in any significant governmental action but rather in the personal social philosophy of Senator Bacon and on property owned by him." 382 U.S. at 316-17 (Footnote omitted). Thus, whether one agrees or disagrees with the suggestion by some commentators that the decision in Newton reflected a recognition that the provision of park facilities is an essential public function, Newton was not a case where, as here, a city which was under a statutory

obligation to provide a public service at public expense elected to delegate its obligation to a private contractor.[12]

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), further explored the question considered in Burton of how much state involvement in private conduct was required before the conduct became imbued with state action. Again, the Court did not consider the very different question of whether the state could delegate its statutory duty unencumbered by the constitutional obligations which would have

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[12]However, if those had been the facts in Newton, and if the private contractor hired by the City of Macon to provide the parks which Macon was required to provide had attempted to exclude blacks, or, for that matter, speakers whose viewpoints conflicted with those of the private contractor, the arguments in favor of state action would undoubtedly have been even more compelling, no matter how benevolent the city's motive in delegating its authority to the private contractor. See Norwood v. Harrison, 413 U.S. 455 (1973), discussed infra at 51 - 57.

been associated with the performance of that duty if the duty had not been delegated. Thus, as the Court noted, Moose Lodge No. 107 did not "discharge[] a function or perform[] a service that would otherwise in all likelihood be performed by the State." 407 U.S. at 175.

The significant distinction between the two questions was recognized in another leading state action decision, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). Although the Court did not find state action in the termination of a customer's power by a private utility, without notice or hearing, the Court stated:

> If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one. But while the Pennsylvania statute imposes an obligation to furnish

> service on regulated utilities, it imposes no such obligation on the State. The Pennsylvania courts have rejected the contention that the furnishing of utility services is either a state function or a municipal duty. 419 U.S. at 352-53.[13]

As this passage illustrates, this Court has indeed recognized that the mode of analysis employed in cases where the state has chosen to become involved in private activity is not necessarily appropriate where the state has chosen to delegate

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[13] In light of this observation, it is particularly significant that the Massachusetts Supreme Judicial Court has interpreted Mass. Gen. Laws Ann. ch. 71B as imposing an obligation on local school committees to "provide an appropriate, publicly supported education to each school-age child with special needs." Commonwealth v. School Committee of Springfield, Mass. Adv. Sh. [1981] 502, 504-5, 417 N.E.2d 408, 410. Unlike the electrical power furnished by the public utility in Jackson, special education programs in Massachusetts are publicly funded, whether they are provided directly by the local government or indirectly through a private school.

public authority. For this reason, Jackson also does not settle the question raised in the present case.

Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978), unlike all the preceding cases discussed, with the possible exception of Evans v. Newton, 382 U.S. 296 (1966), was a case which did involve the asserted delegation of sovereign power to a private entity. In Flagg Bros., the Court declined to find that a New York law which permitted a warehouse to enforce its lien for storage charges through a sale of stored property involved state action. Respondents had argued that the actions of the warehouse were attributable to the state because the state had delegated its dispute resolution function to warehousemen. Although the Court rejected this argument on the ground that dispute resolution had never traditionally been an

exclusive state function, the Court noted that it was expressing "no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions [as education...] and thereby avoid the strictures of the Fourteenth Amendment." 436 U.S. at 163, 164. Although the present case is distinguishable on several grounds,[14] it does raise this very question left unanswered by Flagg Bros.

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[14]For example, the present case involves a complete delegation by the state of its responsibility for the dismissal of special education teachers. Even in Flagg Bros., the state retained its authority to resolve post-sale claims for damages based upon unlawful sales. N.Y. U.C.C. § 2-710(9) (McKinney 1964). Also, in the present case, the state had a duty to provide special education, whereas, in Flagg Bros., there was, at most, only an expectation that the state would resolve private disputes. When the claim of state action relates to a function which the state is obligated to perform, rather than to a function as

(Footnote 14 continued on next page)

B. The Question Presented is Important.

Just as it is beyond dispute that the federal question presented in this case is unsettled, it is similarly beyond dispute that this federal question is an important one, because of both the number of persons

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(Footnote 14 continued from previous page)

to which there is only an expectation of performance, tradition and exclusivity should not be considered essential. This is because tradition and exclusivity are significant only insofar as they give rise to a reasonable expectation that the state will continue to provide a service which it had always provided in the past. This expectation, in turn, gives rise to the further expectation that the service will continue to be provided in accordance with constitutional requirements. It is this latter expectation which the law deems worthy of recognition and fulfillment. However, when a state statute mandates that a service be provided, then regardless of whether the service had been provided by the state in the past, society has not just an expectation that the state will provide the service, but an entitlement to that service. This entitlement itself gives rise to an expectation that constitutional requirements will be observed, which expectation is at least as worthy of recognition and fulfillment as the expectation associated with tradition and exclusivity.

affected and the nature of the rights involved.

In Massachusetts alone, 140,000 children receive some kind of special education services under Mass. Gen. Laws Ann. ch. 71B, and more than 5,500 of those children are placed in so-called "private" day schools or residential programs. Commonwealth v. School Committee of Springfield, Mass. Adv. Sh. [1981] 502, 507, n. 8, 417 N.E.2d 408, 411, n. 8. Moreover, the question is not one confined to Massachusetts. Virtually every state in the nation makes some provision in state law for the obligation to educate similar special needs, exceptional or handicapped children.[15] The overwhelming majority of the states clearly allow this obligation

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[15] A compendium of statutes appears in the Appendix at 85-88.

to be delegated to private entities such as the school in this case.[16] Finally, the federal government has conditioned the receipt of specified federal funds under the Education of All Handicapped Children Act of 1975 on the submission of state plans designed to ensure educational opportunity for handicapped children at no cost to the child's parent or guardian. 20 U.S.C.A. §§ 1401 et seq. (West 1978). Like the Massachusetts statute and the overwhelming majority of other states' statutes, the federal provision permits states to meet their obligation by delegating the education of handicapped students to private institutions. 20 U.S.C.A. § 1413(a)(4)(B) (West 1978). At

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[16] A compendium of statutes appears in the Appendix at 89-91.

least forty-nine states have adopted special education plans pursuant to the federal statute. Note, Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975, 92 Harv. L. Rev. 1103, 1105 (1979).

Moreover, the significance of the rights involved in this case makes it one of public importance meriting review by this Court. This Court has long recognized the importance to this nation of public education. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) ("Providing public schools ranks at the very apex of the function of a State"); Brown v. Board of Education, 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments"). This Court has also long

recognized the importance of public school students being taught by teachers whose First Amendment rights were protected. See, e.g., Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).[17] Not only do the students benefit directly in being taught by teachers who retain their freedom of speech, see id., but their parents and the public benefit by having persons knowledgeable about school affairs contribute to the public debate thereon. See, e.g., Pickering v. Board of Education, 391 U.S. 563, 571-72 (1968).

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[17] As a group, special needs students, because of their disabilities, probably have the greatest need for teachers who are free to comment on their education and, if necessary, to advocate for them.

The decision below also has important ramifications for the future of special education in Massachusetts. When the Massachusetts state legislature enacted Mass. Gen. Laws Ann. ch. 71B, it sought to "prevent denials of equal education opportunity" to special needs children. Commonwealth v. School Committee of Springfield, Mass. Adv. Sh. [1981] at 513, 417 N.E.2d at 414, quoting St. 1972, ch. 766, § 1. Under the First Circuit's interpretation of federal law, those children who are placed by their school committee in ostensibly private schools do not enjoy the benefit of receiving their public education from teachers who have a constitutional right to comment on issues related to that education. Hence, the education which the state so scrupulously tried to make equal has now been rendered

inherently unequal as a matter of federal law.

To summarize, because of the nature of the rights involved and the possible application of this decision to special education programs in virtually every state in the nation, and because the question presented remains unsettled, there is a substantial need for guidance from this Court as to the circumstances, if any, under which local governments may delegate to private schools their statutory duty to provide special education programs without also delegating their attendant constitutional obligations.

2. To the Extent This Court and Other Federal Courts Have Addressed Related Questions, the Decisions Have Conflicted, in Principle, With the Decision of the Court of Appeals in This Case.

Although no other court of appeals appears to have decided the precise ques-

tion raised here, both the Second and Ninth Circuits have found state action in cases which, in principle, are indistinguishable. Also, the United States District Court for the Southern District of New York very recently denied a motion to dismiss for lack of state action on facts virtually identical to those here.

The Second Circuit case, Perez v. Sugarman, 499 F.2d 761 (2d Cir. 1974), was a civil rights suit under 42 U.S.C. § 1983 brought by a parent against, among others, two private child care facilities, for the allegedly unlawful and unconstitutional detention of plaintiff's children. The children had been placed in the private facilities by the City of New York, pursuant to N.Y. Soc. Serv. Law § 395 (McKinney Supp. 1972), which provided that the state was responsible for children in need of

care and protection, and authorized the state, in fulfilling its obligation, to act through authorized private agencies of the type named as defendants in the complaint. The court found state action because the facilities were instrumentalities through which the state was fulfilling its legal obligation to care for the children. As the court explained:

> [T]he statutory scheme expressly contemplates that in performing this public function of caring for children the State may utilize private entities of the sort we have here. This is precisely what the city welfare officials did when they transferred appellant's children to the care of the institutional defendants. But, as the statute makes incontrovertibly clear, it is the State which in effect is providing the care <u>through</u> the private institutions. This exercise of the administrative placing prerogative does not affect in any way the State's ultimate responsibility for the well-being of the children, and, consequently, the public nature of the function being

performed. 499 F.2d at 765 (Emphasis in original; footnote omitted).[18]

Although Perez involved private child care facilities rather than a private school, the statutory scheme under which children were placed in the facilities in Perez was otherwise very similar to the statutory scheme under which students were assigned to the School. Under the reasoning of Perez, any actions of the School directly related to the discharge by the

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[18]Later in its opinion, the court noted that the private institutions would be subject to constitutional requirements only in connection with their discharge of the public function of detaining plaintiff's children, and not with any "'collateral aspect of' the business of operating an institution which cares for children." 499 F.2d at 766, quoting United States v. Wiseman, 445 F.2d 792, 796 (2d Cir.), cert. denied, 404 U.S. 967 (1971). The present case would not require the extension of the state action concept beyond these limits suggested in Perez.

School of its obligation to provide education to those students, including the dismissal of teachers for expressing their views on that education, would be state action. Since Perez and the present case are, in principle, indistinguishable, it is fair to say that there is a conflict between the two circuits on this issue.

The present case is also indistinguishable in principle from, and in conflict with, Ginn v. Mathews, 533 F.2d 477 (9th Cir. 1976). There, the defendant was a private nonprofit corporation which received state and federal funds for the purpose of operating a Project Headstart Program. Such programs were authorized by federal statute and were funded through federal grants "to public or private nonprofit agencies" such as defendant. 533 F.2d at 472 citing 42 U.S.C. § 2809(a).

Plaintiffs alleged that they had been dismissed by defendant in violation of their First, Fifth, and Fourteenth Amendment rights. The district court found no state action and dismissed, but the Ninth Circuit reversed, citing, ironically, an earlier First Circuit decision, McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971).[19]

In the present case, the First Circuit purported to distinguish Mathews on the ground that, in Mathews, "hiring and firing were under the control of a Board of Directors, the composition of which was controlled in part by the regulations." 641 F.2d at 27, n. 23 (App. 23, n. 23). It is not clear to what Board of Directors

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[19] But see Hines v. Cenla Community Action Committee, Inc., 474 F.2d 1052 (5th Cir. 1973), where a divided panel of the Fifth Circuit affirmed a finding of no state action on facts very similar to Mathews.

and to what regulations the First Circuit was referring. Perhaps it was alluding to a federal manual which required that a Headstart Policy Council, consisting in part of parents of Headstart children, be permitted to approve or disapprove the hiring or firing of Headstart staff. 533 F.2d at 480. If so, it is difficult to see why this should distinguish Mathews, because the Headstart parents would have been no more closely tied to the state than the defendant members of the Board of Directors who controlled hiring and firing in the present case. Therefore, it may fairly be said that there is also a conflict between the decisions of the First

and Ninth Circuits on this matter.[20]

The case most nearly on point is an as yet unreported decision of the United States District Court for the Southern District of New York, Ross v. Allen, No. 80 Civ. 3422 (RWS) (S.D.N.Y., filed May 6, 1981), a copy of which is reproduced in the Appendix. Ross involved the New York counterpart of the Massachusetts special education statute, N.Y. Educ. Law §§ 4401 et seq. (McKinney Supp. 1980). Plaintiff had been employed as a psychologist by defendant, a private school whose main function was to educate handicapped children referred to the school by the New

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[20] In fact, in one respect, the argument in favor of state action was considerably weaker in Mathews than in the present case. In Mathews, there does not appear to have been an affirmative obligation on the part of the state or federal government to establish and fund Headstart Programs, whereas, in the present case, local governments were obligated to provide special education.

York City Board of Education. She alleged that she had been unlawfully terminated by the school for exercising her First Amendment rights on behalf of one of the school's students. The school moved to dismiss on the ground that plaintiff's dismissal did not involve state action, but the court denied the motion, on the authority of Perez v. Sugarman, 499 F.2d 761 (2d Cir. 1974). The court stated:

> The statutory scheme involved here is, in all relevant respects, indistinguishable from that relied upon by the court in Perez. Under New York Education Law §§ 4401 et seq., the state has the duty to provide for the educational needs of handicapped children. It can fulfill that duty either through operating programs in the public schools or through contracting with private institutions, but it retains responsibility for the provision of educational services regardless of the means by which they are provided. . .
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> . . . Here, as in Perez, it would appear that the state in effect provides the mandated care through the private institution with which it

contracts. Slip Op. at 5 (App. 68-70) (Footnote omitted).[21]

As Perez, Mathews and Ross illustrate, there is a considerable split of authority among lower federal courts as to the extent to which a governmental agency may delegate statutory duties without also delegating attendant constitutional obligations. In at least two respects, there is also a conflict in principle between opinions of this Court and the decision of the First Circuit. The first conflict concerns the First Circuit's reluctance to find state action in a dele-

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[21]At this point, in a footnote, the court purported to distinguish the present case on the ground that it was not clear from the opinion whether, under the Massachusetts statute, the state continued to be responsible for the child's education following the placement. However, as noted supra, at 9-10, the state continues to have such oversight responsibilities under Massachusetts law. For this reason, Ross is not distinguishable.

gation case without a preliminary finding that the delegation was a subterfuge to evade constitutional requirements. See 641 F.2d at 23-24 (App. 16-17). The second conflict concerns the question of standing.

On several occasions, this Court has emphasized that, when fundamental rights are infringed, effect is at least as important as purpose. For example, in Norwood v. Harrison, 413 U.S. 455 (1973), the Court struck down a program under which the State of Mississippi lent textbooks to private schools, including segregated schools. The district court had found no discriminatory motive, although the effect of the program was to foster discrimination. This Court did not disturb those findings, but it held that a proper motive could not compensate for a

discriminatory effect:

> We need not assume that the State's textbook aid to private schools has been motivated by other than a sincere interest in the educational welfare of all Mississippi children. But good intentions as to one valid objective do not serve to negate the State's involvement in violation of a constitutional duty. "The existence of a permissible purpose cannot sustain an action that has an impermissible effect . . . ." 413 U.S. at 466-67 (Citation omitted).

The Court went on to explain that even though the private schools had associational rights, including the right to practice private discrimination, those rights were outweighed by the discriminatory effect of the program. 413 U.S. at 469-70.

Norwood suggests an appropriate framework for analysis of the present case. First, the court of appeals should have attempted to identify the competing interests at stake. Then it should have

attempted to weigh those interests in the context of the facts of the case. Finally, it should have considered the probable way its decision would affect those competing interests.

Had the First Circuit undertaken this type of analysis, it would have observed that the School, like other private individuals and institutions, has certain privacy and associational rights, including the right to hire and fire employees.[22] On the other hand, because public school students are assigned to the School, competing First Amendment interests are at stake. Assigned students do not freely choose to become associated with the School. Yet, they have as much

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[22]The state action requirement is itself one of the strongest safeguards against federal encroachment on privacy and associational rights.

interest as other public school students in receiving their education from teachers who need not fear for their jobs if they speak out on matters of educational policy. Parents of such students also have a strong interest in being able to discuss educational programs with teachers who can be candid in the expression of their opinions. Members of the community, who fund special education programs through their tax dollars, also have an interest in hearing the opinions of teachers as to how wisely those dollars are being expended. All of these interests should have been identified as worthy of protection.

The second step in the analysis should have been for the court to weigh those competing interests. In doing so, it would have been appropriate for the

court to consider the fact that teachers are uniquely qualified to contribute to public and private debate concerning educational programs and policies, by virtue of their training, their experience, and, perhaps most importantly, their proximity to their students and their familiarity with their students' needs. It would also have been appropriate to consider the fact that the speech for which petitioners were dismissed included public speech (in a town newspaper) and private speech (to the Board of Directors) which was directly related to the performance of the public function which the state had delegated to the School. Conversely, the court should have discounted the School's claim to privacy and associational rights in recognition of the fact that the School willingly accepted

the placement by the state of all fifty of the School's students, as well as public funds appropriated by the state to pay for the education of those fifty students.

Finally, after weighing the competing interests, the court should have considered the likely effect its decisions would have on those interests. Had it done so, it would have been clear that a rejection of petitioners' state action claim would have the effect of making more teachers reluctant to participate in public or private debate concerning special education, to the detriment of students, parents, concerned citizens and the values embodied in the First Amendment. On the other hand, since the School's entire student body had been placed there by the

state, at the School's request and at public expense, and with the School's wholehearted approval, it would also have been apparent that extending limited First Amendment protection to teachers under the circumstances of this case would not seriously impair the School's privacy and associational rights. Therefore, under this type of analysis, which would have been more in keeping with prior decisions of this Court, the court of appeals should not have dismissed petitioners' claims.

The decision of the court of appeals also conflicts, in principle, with decisions of this Court to the extent it suggests that, because petitioners were not "intended beneficiaries of the service for which the state has contracted with the school," 641 F.2d at 26 (App. 23), they lacked standing to challenge their

dismissals on First Amendment grounds. This narrow view of petitioners' standing overlooks cases such as Marsh v. Alabama, 326 U.S. 501 (1946), which emphasize that the right of free speech should be preserved not just for the benefit of the speaker but for the benefit of society as a whole. For reasons previously discussed, teachers are uniquely qualified to participate with students, parents, school administrators and the community at large in debates concerning educational policy and programs. Indeed, as professionals in the field of education, they would properly feel an obligation to do so. Yet, if they know they may lose their jobs for expressing their opinions as freely as their counterparts in public schools, they will be reluctant to participate in those debates. Thus, the

critical question should not have been whether petitioners were the "intended beneficiaries" of the state's contract with the School, but rather whether the intended beneficiaries of the First Amendment, namely the students, their parents and the community, would have been better served by recognizing the right of teachers to speak out as petitioners did here.

CONCLUSION

As this Court has recognized, the question presented in this case is an unsettled one. It is also a question of considerable importance in federal law. The court of appeals failed to recognize the novelty of the question herein, failed to apply a suitable analysis, and reached a result that conflicts, in principle, with decisions of other courts of appeal

and with a decision in a virtually identical case by a federal district court. For all these reasons, and because this Court's guidance is needed to assist lower federal courts in their historic task of protecting core First Amendment values in the public education of the nation's school children, this petition for writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 80-1328

SHEILA RENDELL-BAKER,

PLAINTIFF, APPELLANT,

v.

SANDRA KOHN, ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. ANDREW A. CAFFREY, *U.S. District Judge*]

No. 80-1451

WAYNE KLUG, ET AL.,

PLAINTIFFS, APPELLEES,

v.

NEW PERSPECTIVES SCHOOL, INC., ET AL.,

DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. A. DAVID MAZZONE, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

Robert J. Doyle, with whom *Doyle, Playter, Novick & Berkin* was on brief, for Sheila Rendell-Baker.

Matthew H. Feinberg, with whom *Mary Catherine Leonard*, and *Kassler, Feinberg & Feuer* were on brief, for the New Perspectives School, Inc., et al.

Betty E. Waxman, Assistant Attorney General, Government Bureau, Department of the Attorney General, with whom *Francis X. Bellotti*, Attorney General, was on brief, for Francis X. Bellotti, et al.

Kurt M. Pressman, with whom *Goldstein & Pressman* was on brief, for Wayne Klug, et al.

February 12, 1981

CAMPBELL, *Circuit Judge*. These two consolidated appeals from differing judgments in the district court involve claims brought under 42 U.S.C. § 1983 by former staff members of the New Perspectives School, Inc. Plaintiffs contend they were discharged because of exercise of their first amendment rights and without due process. The only question now before us is whether, in discharging plaintiffs, the defendants acted "under color of any statute, ordinance, regulation, custom or usage, of any state."

I.

The decisions under review both occurred without the taking of any evidence. In *Rendell-Baker*, summary judgment for defendants was entered on the basis of the pleadings, exhibits appended to the complaint, answers to interrogatories, and affidavits submitted in support of and in opposition to defendants' motion for summary judgment. These documents comprise the record in that case. In *Klug*, the court denied a motion to dismiss for failure to state a claim on which relief may be granted, taking the facts alleged in the complaint and supported by the appended exhibits in the light most favorable to the plaintiffs. Strictly speaking, the record in *Klug* consists only of the complaint, and that case presents only the question whether the district court erred in holding that it did not appear "beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957); *Walker Process Equipment* v. *Food Machinery*, 382 U.S. 172 (1965). Appellees in *Klug* have, however, invited us to consider the record in *Rendell-Baker* along with their complaint. Given this invitation, and the fact that the additional information in the *Rendell-Baker* proceeding tends, if anything, to support

rather than to weaken their claim of state action, we feel free to draw on the records of both cases in describing the school and its relationship to the state, as we ultimately rule against plaintiffs on this critical issue.

a. *The New Perspectives School*

The New Perspectives School is a small, non-profit school which offers a high school program to students who have had difficulty completing an ordinary high school. The school is organized as a non-profit corporation under the laws of Massachusetts and is located on privately owned property in the Town of Brookline, Massachusetts. The school is operated by a Board of Directors, no member of which is a government official or is chosen by any government official or governmental body. The record is silent as to the history of the school; we do not know anything about its age, founding or original sources of funding.[1] The school serves approximately 50 students, all on a tuition-free basis. Virtually all the students have drug, alcohol, or behavioral problems, or have other special needs, and most are referred to the school by the Town of Brookline or the City of Boston under Chapter 766 of the Massachusetts Acts of 1972, or by the Drug Rehabilitation Division of the Massachusetts Department of Mental Health.[2]

[1] At oral argument, counsel for the school indicated that the school was set up initially with private funds but has become increasingly dependent upon public funds as they have become available.

[2] Chapter 766, Mass. G.L. c. 71B, § 3, provides that each school committee is required to identify students with special needs and to propose and arrange for an educational program suitable for each such child. Parents may reject the school committee's placement and elect instead a regular school program, unless it is determined that the child's placement in a regular program will seriously endanger the child's health or safety or substantially disrupt the program. If, however, the parents reject the school committee's placement and choose instead another special placement, they must submit the matter to the state advisory commission on special education, unless, of course, they are willing to themselves bear the ex-

As of July 1978, when the school answered Ms. Rendell-Baker's interrogatories, all 50 students were referred there by one or more of these governmental bodies. We were informed at oral argument that students could also come to the school through private referral sources or on their own initiative. According to the complaint in *Klug*, the school is authorized to issue high school diplomas certified by the Brookline School Committee.

New Perspectives School has received funds, in varying amounts over the years of its operation, from numerous governmental agencies. In answer to an interrogatory the school indicated the following funding sources: Chapter 766;[3] Town of Brookline; Massachusetts Department of Mental Health; Department of Youth Services; Massachusetts Division of Family and Children's Services; Office for Children; Law Enforcement Assistance Administration (LEAA);[4] Private Contributors and Foundations. For the fiscal year 1975-76, funds from the various governmental sources accounted for approximately 91 percent of the school's budget, while private donations accounted for 9 percent. For 1976-77, the figures were approximately 99 percent and 1 percent.[5] We have no figures

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pense of their chosen program. The district court's memorandum in case No. 80-1451 indicates that the Town of Brookline does not itself maintain facilities for special needs students, but we have found nothing in the record to support that statement.

[3] We are not aware of any funding agency called "Chapter 766." Our reading of that statute, Mass. G.L. c. 71B, §§ 3, 4, suggests that responsibility for the costs of special education rests on the school committees of each city, town and region. We therefore interpret the school's reference to Chapter 766 as a funding source as referring to funds received from school committees as payment for services to students placed with the school in fulfillment of the requirements of that statute.

[4] We interpret this reference to LEAA as indicating funds granted to the school by the Massachusetts Committee on Criminal Justice, an organization which disburses federal funds received by the state from LEAA.

[5] These percentages are approximate, based on rounded off

for other years, but the school does not suggest that these two years were unrepresentative.

In order to be eligible for these forms of public funding, the school has been required to conform to various governmental regulations. To receive placements, and funding, under Chapter 766, a school must be approved by the Massachusetts Department of Education.[8] The Department has issued a 33-page set of "Guidelines for the Approval of the Day Educational Component in Private Schools under Chapter 766." These guidelines relate to a wide variety of aspects of a school's operation, including financial recordkeeping, student discipline, staff training, use of volunteers, medical examinations for students, parent involvement, health care, subjects of instruction, teacher-student ratio, qualifications of teachers, evaluation of teachers, student records, confidentiality of records, transportation, insurance, food and nutrition, food preparation, toileting procedures, physical space and facilities, and classroom equipment. The guidelines also require that the school carry out each element of the educational plan specified for each child by the local school committee under Mass. G.L. c. 71B, § 3. On personnel policies the guidelines are less specific than they are on some other issues; they require only that the school maintain written job descriptions and a written policy on criteria and procedures for

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figures given in the school's answers to interrogatories, as follows: for fiscal year 1975-76, $90,000 from government sources and $9,000 from private sources; for 1976-77, $161,000 from government sources and $2,000 from private sources.

[8] Mass. G.L. c. 71B, § 4 provides in part:

> "The school committee of any city, town or school district may, to meet its obligations under section three, with the approval of the department enter into an agreement with any other school committee to jointly provide special education or, subject to the consent of the parent or guardian affected thereby and subject to constitutional limitations, may enter into an agreement with any public or private school, agency, or institution to provide the necessary special education within the city, town or school district."

hiring, suspension and dismissal, procedures for handling staff complaints, and provisions for vacations and other benefits.

The school is also bound by its agreement with the Massachusetts Department of Mental Health, Drug Rehabilitation Division. Under that contract, the school, which is designated as "the Contractor," is required to provide counseling, educational and prevocational services for drug dependent or drug abusing persons and to give priority to clients referred by the Division. The contract provides for reimbursement of expenses specified in an attached schedule. The contractor is required to abide by certain general requirements regarding such subjects as equal employment and equal service, respect for the human rights of the persons served (*i.e.*, with regard to research on human subjects), and avoidance of conflicts of interest. The contract makes no mention of personnel policies or rights of staff members.

The school's contract with the City of Boston subjects it to additional regulation. That contract states as its purpose compliance with the City's obligations under Chapter 71B through "the furnishing of special educational services by private facilities." Under the contract, the school must carry out the educational plan devised by the Boston School Committee for each Boston student placed with the school. The school must submit periodic reports on its services, and it is subject to inspection at any time during normal business hours. Pupil records must be kept confidential, and the school's employees are subject to the state conflict of interest law, Mass. G.L. c.268A. Except for this latter provision, the school "shall have no capacity to ... incur any liability on the part of the city. The Facility, its agents or employees shall not have the status or pension rights of a city employee ...." The contract also provides that the school, and not the City, shall bear liability for any injuries to students or employees and for any claims "arising from any act or omission of the Facility, its agents or employees ...." The school's answers to interrogatories in-

dicated that it is subject to additional regulations by the Department of Youth Services and by the Brookline School Committee, but the record does not include details of these regulations.

In May 1975, the school, through the Town of Brookline,[7] submitted a grant proposal to the Massachusetts Committee on Criminal Justice, a state agency which distributes funds received from the federal Law Enforcement Assistance Administration. The proposal was for a vocational program to provide students and recent graduates with vocational counseling, training in job skills, and placement in jobs. The grant application includes a statement that the applicant would comply with a set of general conditions relating to the use of the funds and to the sources of other funds for the project. Only one of these conditions makes any mention of staff or personnel; that one provides that "The staff and/or consultant competencies and resources necessary to assure successful conduct of the project will be provided. Prior approval of the Committee is required for staff hiring and salary increases of any kind, and for engaging consultants in accordance with OMB Circular A-102 and Federal Procurement Manual M 1700.6."[8] The proposal describes in detail the vocational

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[7] The grant application, submitted as an exhibit by Ms. Rendell-Baker, lists the applicant as the Town of Brookline, with the New Perspectives School listed as the implementing agency. The grant was awarded by the Committee to the Town for the school. Brookline provided 5 percent matching funds, while the state provided an additional 5 percent. In a "Field Monitoring Inspection" report dated February 25, 1977, a grant manager of the Committee reported that "Although the grant is carried out by New Perspectives School, Inc., the employees of the grant are considered Town employees, and therefore no contract exists between Brookline and New Perspectives." At oral argument in this court, however, counsel for Ms. Rendell-Baker indicated in response to a question as to why the Town was not named as a defendant, that she was not aware of the involvement of the Town of Brookline until discovery for this action was conducted on the state defendants.

[8] Defendant Highgas states, in his affidavit in support of defendants' motion for summary judgment in *Rendell-Baker*, that the

program, which apparently was already in operation at the time of the grant application, and provides a job description for the vocational counselor. The grant was approved for the year 1976 and renewed for 1977.

b. *Discharge of Ms. Rendell-Baker*

Sheila Rendell-Baker, who had been serving as a volunteer, was hired as the vocational counselor funded by the grant. Ms. Rendell-Baker held that position until she was discharged on January 3, 1977. Her account of the discharge, as alleged in her complaint, is as follows: In December 1976, a controversy arose between a group of students and the school's director, Ms. Sandra H. Kohn, related to the responsibilities of a student-staff council in the hiring of staff. The students presented a petition at a meeting of the Board of Directors. Ms. Rendell-Baker voiced support for their position, and Ms. Kohn voiced opposition. On January 3, 1977, without prior notice, Ms. Kohn requested that Ms. Rendell-Baker resign. When Ms. Rendell-Baker refused to resign, Ms. Kohn discharged her, without citing any specific cause or allowing her any opportunity to respond to allegations against her.

After her discharge, Ms. Rendell-Baker, through her attorney, contacted the school and demanded either reinstatement with back pay or a hearing, on the ground that she had been discharged for exercise of her first amendment rights and without due process. After an exchange of letters, which Ms.

Committee's prior approval of hiring consisted of reviewing resumes submitted by the school to ensure that applicants' qualifications met the requirements established by the school in its proposal, and that the Committee did not interview applicants or exercise any subjective judgment in the hiring process. In this regard, defendants cite LEAA Circular A-87, which provides in part:

> "Each grantee or contractor organization, in recognition of its own unique combination of staff facilities and experience, will have the primary responsibility for employing whatever form or organization and management techniques may be necessary to assure proper and efficient administration."

Rendell-Baker submitted as affidavits, the school agreed to apply retroactively a newly adopted personnel policy, which provided for involuntary termination for specified causes, subject to review by a three-member grievance committee. The school's president appointed a grievance committee, but Ms. Rendell-Baker objected to its composition and demanded a formal hearing before a mutually agreeable committee. The record does not reflect any further action by the school on the matter.

On December 13, 1976, the school informed the Committee on Criminal Justice by letter that Ms. Rendell-Baker had been terminated, effective January 14, 1977, and that the school had chosen a candidate to fill the position. On January 17, Ms. Rendell-Baker's attorney sent to the Committee a copy of his letter to the school protesting her discharge. A representative of the Committee informed the school, in a letter dated February 23, that "While the Committee makes no comment on the matter, you are advised that no candidate to fill the subject position will be approved until such time as you provide me with written justification of your action, specifically citing any rules and regulations under which the action was taken." The school responded with an account of its actions,[9] and the Committee answered, on March 29, indicating that it was satisfied.[10] The Committee then informed Ms. Rendell-

[9] The school's response occurred in two separate letters. The Committee answered the first with the following statement: "[W]hile you explain your actions in great detail, you fail to shed any light on exactly how the decision was reached, whether or not you adhered to any established criteria or procedure, and what kind of notice was given to Ms. Rendell-Baker." The school's second letter apparently satisfied the Committee.

[10] This letter from the Committee included the following:

"You are advised, however, that if you move to fill the vacant position and you choose to expend funds, you will not have LEAA money available to meet a successful claim for back pay by Ms. Rendell-Baker. Payment of such a claim would be allowable to the extent that the salary remains unexpended.

Baker's attorney, in response to his request that it hold a hearing, that:

> "The Committee is not in a position to demand that a hearing be held or to impose sanctions against New Perspectives School, Inc. for its failure to hold such a hearing. The Committee can, however, hold Ms. Kohn to her assurances before approving a new hire to fill Ms. Rendell-Baker's position."[11]

Ms. Rendell-Baker brought this suit in July 1977.[12] Upon completion of discovery, defendants Bellotti and Highgas moved for summary judgment on the ground that Ms. Rendell-Baker's dismissal had not occurred "under color of state law." Alternatively, they sought dismissal of the action as to themselves. Ms. Rendell-Baker submitted a memorandum opposing the motion, but she neither contested nor conceded that no material issues of fact remained on the question of state action. By an order dated April 16, 1980, the district court granted both motions.[13] Ms. Rendell-Baker brought appeal No. 80-1328.

> LEAA funds may not be used to pay any other form of damages or any fines or penalties that might be levied against the New Perspectives School, Inc."

[11] The reference to "assurances" appears to indicate Ms. Kohn's statement, in her letter to the Committee, that the school's personnel policy would be applied retroactively so that the matter could be heard by a grievance committee.

[12] Named as defendants were the school, the members of its Board of Directors, including Ms. Kohn, both individually and in their official capacities, Francis X. Bellotti as chairman of the Massachusetts Committee on Criminal Justice, Robert J. Kane, former Executive Director of the Committee, and certain federal officials in their capacities as officials of LEAA. William Highgas, current executive director of the Committee, was later substituted for his predecessor, and the federal defendants were dismissed by order of the district court on April 12, 1980.

[13] The order terminating the action is phrased as a dismissal, although it occurred in response to a motion for summary judgment.

c. *Discharge of the plaintiffs in case No. 80-1451*

Case No. 80-1451 arises out of a later series of disturbances at the school. According to the complaint, during the 1977-78 school year, the school experienced a considerable amount of dissension among both faculty and students. Some members of the faculty considered the school's difficulties attributable to inadequate management by the Director, Sandra Kohn; in May 1978 the plaintiffs wrote a letter to the school's Board of Directors urging it to discharge Ms. Kohn. The Board responded by affirming its confidence in Ms. Kohn. On June 5, 1978, students of the school picketed the home of James Schlesinger, president of the school's Board of Directors, to express opposition to Ms. Kohn's directorship. Ms. Kohn directed the staff to tell the students that further picketing would cause their suspension. The staff did so, but the plaintiffs later informed her that an attorney had advised them that the prohibition on student picketing was unconstitutional. Sometime during this period, the *Brookline Chronicle* carried an article about the disturbances at the school. On June 15, 1978, a letter to the editor appeared in the *Chronicle* in which the plaintiffs refuted some statements in that article and stated their belief that the prohibition on picketing was unconstitutional. That same day, the plaintiffs informed Schlesinger that they were forming a labor organization. On June 16, Ms. Kohn discharged four of the plaintiffs. A fifth, Dawn Fonseca, had previously resigned but later offered to withdraw her resignation. Mr. Schlesinger declined the offer and accepted her resignation on June 9.

The five plaintiffs brought this suit in December 1978, naming as defendants the New Perspectives School and each of its directors, both individually and in their official capacity. The school moved to dismiss on the ground that it had not acted "under color of state law." The district court denied the motion but certified its order for interlocutory appeal under 28 U.S.C. § 1292(b). We granted leave to appeal and consolidated the two cases.

II.

Section 1983 of 42 U.S.C. provides for legal liability in favor of an injured party against,

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983.

In the Civil Rights Cases, 109 U.S. 3, 11 (1883), the Supreme Court declared, "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the [fourteenth] amendment." The Court reiterated this principle in *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1947), when it stated that "the action prohibited . . . is only such action as may fairly be said to be that of the states. [The fourteenth] amendment erects no shield against merely private conduct, however discriminatory or wrongful." The question before us, therefore, is whether the action of the New Perspectives School in discharging the plaintiffs "may fairly be said to be that of the State."

Plaintiffs in the two cases argue, citing *Burton* v. *Wilmington Parking Authority*, 365 U.S. 716 (1961), that the New Perspectives School is "sufficiently intertwined with the state to imbue its actions with the color of state law" — that is, that the school is in reality a state institution, so that any action by it is action of the state. Ms. Rendell-Baker makes the alternative argument that, because of the action of the Committee on Criminal Justice in creating and funding her position and in approving her discharge, the school's action in regard to her is attributable to the state even though other action by the school would not be.

Defendants, citing *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), and *Moose Lodge No. 107* v. *Irvis*, 407 U.S.

163 (1972), argue that action of the school may be considered state action only if the state participated directly in the particular action which is under attack, no matter how close the overall relationship between the school and the state. Defendants point out that the decision to discharge the plaintiffs was made by privately appointed officials of the school, not by any state officials, and that no state agency had undertaken to regulate or control the school's policies or procedures for hiring and firing staff. They conclude, therefore, that plaintiffs' discharges were not the action of the state.

In *Burton*, the Court found state action in the discriminatory service policy of a privately operated restaurant located in a publicly owned parking garage. There was no question that the restaurant controlled its own affairs and had reached on its own the decision to refuse service to blacks. But the Court found that "The State has so far insinuated itself into a position of interdependence with Eagle [Coffee Shop] that it must be recognized as a joint participant in the challenged activity." *Id.*, at 725. The Court emphasized the restaurant's use of "an integral part" of a publicly owned and maintained building which was by statute dedicated to "public uses," and the mutual benefits conferred upon both the restaurant and the parking authority by their association. The Court noted particularly that, to the extent that the restaurant's discriminatory service policy contributed to its profits, that policy contributed also to "the financial success of a government agency." *Id.*, at 724. The Court warned, however, that it did not intend "to fashion and apply a precise formula for recognition of state responsibility," and that "only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance." *Id.*, at 722.

In *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), the Court found no state action in the discriminatory service policy of a private club which held a state liquor license, de-

spite the state regulation that went with the grant of a liquor license. The Court expressed no disapproval of *Burton*, but rather distinguished that case on the ground that the Moose Lodge was not located on public property and did not have the sort of "symbiotic relationship" with the state that the Eagle Coffee Shop had had. *Id.*, at 175. Finding no close overall relationship, as in *Burton*, the Court considered whether the regulations of the State Liquor Control Board in any way encouraged racial discrimination, and found that they did not.

The Supreme Court's most recent pronouncements occur in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974). There the Court found no state action in the discontinuation of service to a customer, without a hearing, by a privately owned and operated, but heavily regulated, utility company. The Court defined the inquiry as "whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the state itself." *Id.*, at 351. To answer this question, the court considered whether the state had directly encouraged or approved the particular practice under challenge, and found that it had not. But the Court did not stop there. It again distinguished *Burton*, without expressing any disapproval of that case, finding that extensive regulation and performance of a public service "affected with a public interest" were not enough to show the "symbiotic relationship" found in that case.[14]

The plaintiffs in these cases argue that *Burton* and *Jackson* establish two distinct tests, with the *Jackson* test applicable where the *Burton* test fails, and that the *Burton* test is satisfied here. Defendants respond that *Jackson*, together with *Moose Lodge*, has implicitly overruled *Burton*, and has established as determinative of state action a test of the direct connection between the state and the challenged action. A panel of this

[14] The *Jackson* Court did not accept the assertion that the utility held a state-granted monopoly. *See* p. 351, n.8.

court indicated in *Downs* v. *Sawtelle*, 574 F.2d 1, 8-9 (1978) (finding state action in an involuntary sterilization at a community hospital run by a town-appointed Board of Directors), that it did not believe that *Burton* has been overruled. It stated, at 9:

> "The essence of *Burton* which survives *Jackson* is that the relationship between the state and the private institution may be so intertwined that the state will be held responsible for conduct with which it had no direct connection."

See also Holodnak v. *Avco Corp.*, 514 F.2d 285 (2d Cir. 1975) (applying *Burton*, after *Jackson*, to find the first amendment applicable to an employee of a company doing defense-related work on United States government property).

The more difficult problem, of course, is to decide what constitutes such an "intertwined" relationship. Although we do not presume to establish the "precise formula" which the Supreme Court has declined to fix, we think it possible to identify certain factors which have tended to weigh heavily in findings of such a relationship. In *Burton* itself, the strongest factor seemed to be the use of public property, and particularly its use in a way that excluded a segment of the public. We relied heavily on the same factor in *Fortin* v. *Darlington Little League*, 514 F.2d 344 (1975) (state action found in sex discrimination by Little League, all of whose activities were carried out on town field specially laid out for Little League use). *See also Holodnak* v. *Avco Corp.*, 514 F.2d 285; *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1973) (city enjoined from permitting exclusive use of public parks by segregated private groups, where the city had previously been ordered to desegregate the public parks).

Downs v. *Sawtelle*, 574 F.2d 1, involved public property only in the sense that the Town had a right to receive the hospital's profits and its assets upon dissolution. The more significant factor there, however, was that the Town Board of Selectmen appointed the hospital's entire Board of Directors.

That factor made the case an example of a situation where "state involvement with a private entity . . . is 'so dominant as to afford a basis for a contention that the state is merely utilizing private trustees to administer a state activity.' " *Braden* v. *University of Pittsburgh*, 552 F.2d 948, 974 (3d Cir. 1977), Garth, J., concurring, quoting *Powe* v. *Miles*, 407 F.2d 73, 81 (2d Cir. 1968). In such a situation, every decision made by the nominally private entity may fairly be attributed to the state, since the decision-makers derive their authority from the state.

In *Powe* v. *Miles*, *supra*, and *Braden* v. *University of Pittsburgh*, *supra*, the courts relied on expressions of intent by the states to treat a disputed entity as arms of the state.[15] In each of those cases, the state legislature had passed a statute indicating the nature of the state's relationship to the university involved. In the *Pittsburgh* case, the statute specifically declared that one university to be state-related, and it changed the school's name to indicate the state's role. In *Powe* v. *Miles*, New York statutes designated the state contract colleges as integral parts of the state university, and referred to the private university which housed the contract college in question as "the representative of the state university trustees." *Id.*, at 83. These cases indicate that where a state expresses its own understanding that an institution is under its control and subject to its constitutional obligations, these expressions may be given great weight.

Finally, should a public institution be placed in private hands with the actual purpose of evading constitutional requirements, the courts may look beyond the formal structure of the institution to find other indicia of state involvement. *See, e.g.*, *Evans* v. *Newton*, 382 U.S. 296 (1966) (appointment of private trustees to manage a previously public park, the use of which was limited to whites by the will of the donor, found

[15] Both these cases also involved some use of public property and some state representation on the schools' boards of directors.

insufficient to divest the park of its public character); *Gilmore* v. *City of Montgomery*, 417 U.S. 556.

III.

We have carefully considered the facts of this case, and although we note a considerable degree of cooperation between the state and the school, we are not persuaded that any of the particular factors we have discussed applies to the New Perspectives School, or that any other factors justify a finding that the challenged action occurred "under color of state law." Plaintiffs concede that the school does not conduct its activities on public property or within public facilities, as in *Burton* and *Fortin*, *supra*, and there is no suggestion of a subterfuge to avoid constitutional obligations through creation of a sham private entity as in *Evans* and *Gilmore*. To be sure, we are told the Town of Brookline permits the school to issue high school diplomas certified by its school committee. Arguably this amounts to an expression of intent by the Town comparable to that of the governmental bodies in *Braden* and *Powe*, to treat the school as a public institution.[16] The state's other pronouncements, however, particularly the references to private schools in Mass. G.L. c.71B, § 4, and in the Department of Education's guidelines, and the references to the school as a contractor in the Department of Mental Health Agreement and the City of Boston contract, all indicate that the state does not regard the school as a public institution. *See also* note 9, *supra*, regarding the LEAA policy, which is binding on the state's Committee on Criminal Justice. These indications that the state regards the school as private outweigh any contrary inference from Brookline's certification of the school's diplomas.

[16] The record is not clear whether the diplomas issued are the same as those received by graduates of Brookline High School, or whether Brookline merely certifies in some manner the diplomas issued to Brookline students placed under Chapter 766 in all private schools.

Plaintiffs would have us focus on the state's purported dominance in the affairs of the school, to bring the case within our holding in *Downs* v. *Sawtelle*. They rely particularly on four aspects of the relationship between the state and the school: (1) almost complete state funding; (2) extensive regulation; (3) the school's performance of the "public function" of education, particularly special education required of local communities by state law; and (4) mutual benefits which the school and the state derive from their relationship.

The school's funds do, in fact, derive almost completely from governmental sources.[17] This, in our view, is the strongest factor indicating state action. We have, as have other courts, indicated on past occasions that lesser contributions of state funding are not enough to demonstrate state action in all aspects of the operations of an institution. *Cannon* v. *University of Chicago*, 559 F.2d 1063 (7th Cir. 1976) (undetermined amount of state funding of medical school did not show state action in the school's admissions policies); *Berrios* v. *Inter-American University*, 535 F.2d 1330 (1st Cir. 1976) (Puerto Rico University's suspension of students was not state action, despite an undetermined amount of public funding and some regulation by the Commonwealth's accrediting body). *See also McQueen* v. *Drucker*, 438 F.2d 781, 784 (1st Cir. 1971) ("Mere receipt of financial subsidy and subjection to some regulation are the conditions of much of our societal life.") This school's virtual dependence on state financial support goes well beyond anything we have considered before. Since

[17] Defendants argue that we should not count in this calculation funds originating with the federal government. Since the amount of those funds is too small to affect significantly the school's overall dependence on state funding, this case does not turn on the effect of federal funds. We note, however, that the federal funds were funneled through a state agency which appears to have considerable discretion in making grant awards. The exercise of such discretion is doubtless a factor to be weighed in favor of state action, even if the funds themselves are federal in origin.

state funds support every aspect of the school's operation, everything the school does, it can be argued, is made possible by the state. And the state could, if it chose to do so, veto any action of the school it found objectionable by threatening to withdraw its financial support. But the school's dependence on state funds, in itself, demonstrates only that the state has the potential to control the school's operations, not that it actually does so. As a practical matter, the state has the same latent power in relation to any contractor whose primary customer is the state.[18] Indeed the state's power to control any nominally private institution is limited only by the constitutional boundaries of the police power, even where the state does not provide funding. In practice, of course, the state's exercise of its power to control an institution is likely to be greater where it assumes the burden of financial support; for that reason, state funding may be significant evidence of state control. But to find that an otherwise privately operated institution is so dominated by the state that all its actions occur "under color of state law," we must find that the state actually does control the institution, not just that it could do so. In the case of a non-profit organization, the directors' fiduciary duty is to further the causes for which the entity was chartered, regardless of the sources of its funding. For example, a school for the deaf or the blind, managed by an all-private board, does not surrender its rights to pursue independent policies merely because the students are on state-funded scholarships. Even near-complete governmental funding does not turn a private charitable and educational institution into a public entity so long as the private institution remains free, in fact, to control its own affairs.

[18] There are, for example, a considerable number of businesses, such as manufacturers of defense-related equipment, and some research and consulting firms whose clientele consists mainly or entirely of governmental agencies.

Plaintiffs would have us infer state domination from the regulations to which the school is subject. The school is regulated by a number of state and local agencies, and some of these regulations are very detailed. But we are not persuaded that the school's "freedom of decision-making has . . . been circumscribed substantially more than that generally accorded an independent contractor." *McQueen* v. *Drucker*, 438 F.2d at 784-85. The degree of state regulation here is not greater than that exercised over the utility in *Jackson* v. *Metropolitan Edison*, 419 U.S. 345. Each of the various kinds of regulations to which the school is subject would apply as well to a private institution which contracted with the state to educate one student or to conduct one small program in return for a small amount of funds. The school's contractual obligations to the Department of Mental Health and to the Committee on Criminal Justice are similar to the obligations undertaken by any grantee of government funds; they resemble also the obligation that a grantee of funds from a private foundation might incur. The details are provided by the grantee itself in its grant application; and the general conditions are just that — they impose few constraints on the decision-making power of the grantee's management. The guidelines issued by the Department of Education apply to any school at which a locality seeks to place even a single child under chapter 766; the Department appears to contemplate placement of some children in schools whose other students are all privately funded. The Department's guidelines are particularly detailed as they relate to the services to be provided to students, just as any contract for services spells out in detail the services to be performed. But aspects of the school's operation which do not relate directly to services to students are left to the discretion of the school's privately appointed management, just as other government contractors are left free to manage their own affairs so long as they provide the services for which they have contracted. For purposes of this case, it is particularly impor-

tant that none of the state agencies involved has undertaken to regulate the school's personnel policies, except to require that its policies be set forth in writing. The content of the school's personnel policies, including criteria and procedures for hiring and firing, has been left to the discretion of the school's management.[19]

Plaintiffs argue that the school performs a public function.[20] They point out that education at the primary and secondary levels, in contrast to higher education, has most often been a public function in this country. *Compare Krohn* v. *Harvard Law School*, 552 F.2d 21 (1st Cir. 1977) (no state action in Harvard Law School admissions policies, despite public importance of legal education); *Lamb* v. *Rantoul*, 561 F.2d 409 (1st Cir. 1977) (no state action in denial of tenure to a professor at the Rhode Island School of Design, a college-level art school); *Berrios* v. *Inter-American University*, 535 F.2d 1330. *But see Weise* v. *Syracuse University*, 522 F.2d 397 (2d Cir. 1975) (state action found in discharge of instructor at Syracuse University, a nominally private school receiving some public funds). Plaintiffs further insist that Chapter 766 reflects the state's view that special education is a public responsibility, or at least that the state considers it advisable to assume that responsibility. But the fact remains that there is a strong tra-

[19] Defendants aver in an uncontested affidavit that the Committee on Criminal Justice reviewed hiring decisions only to ensure that the chosen candidate met the school's own criteria, and that the Committee exercised no subjective judgment in hiring. *See* note 9, *supra*. In any event, the Committee's grant funded only one position at the school.

[20] The "public function" concept seems to derive from *Marsh* v. *Alabama*, 326 U.S. 501 (1946), in which the Supreme Court held that first amendment rights of one distributing religious literature applied to the privately owned streets of a company town. The Court emphasized that the company had treated the streets as public and had not restricted access to them. Its holding therefore may imply a kind of public easement based on estoppel.

dition of private elementary and secondary education in this country, and that special education is clearly not an *exclusively* public function. Indeed, it is only recently that public school systems have assumed any responsibility for children with special needs; until a few years ago such children were routinely excluded from public schools. The fact that the state has chosen to perform a service, or to require its political subdivisions to do so, does not make that service an inherently public function.

The "public function" concept is strongest, moreover, when asserted by those for whose benefit the state has undertaken to perform a service, or when the state has lent its coercive powers to a private party. In this situation, for example, those students of the New Perspectives School who were placed there by their local school committee, particularly those who are compelled to attend under the state's compulsory education laws, would have a stronger argument than do plaintiffs that the school's action *towards them* is taken "under color of" state law, since the school derives its authority over them from the state. *See, e.g., McQueen* v. *Drucker*, 438 F.2d 781, in which we found state action in the eviction of tenants by the private owner of a subsidized housing complex.[21] The plain-

[21] These plaintiffs and other private school teachers are, of course, fully protected against discriminatory treatment by Title VII of the Civil Rights Act of 1964, as well as by state employment discrimination laws. Our ruling therefore in no sense licenses discriminatory policies. Compare *Weise* v. *Syracuse University*, 522 F.2d at 405 (lesser state action standard for claims of discrimination than for due process claims because of "peculiar offensiveness" of excluding some citizens from benefits for which all are taxed); *Jackson* v. *Statler Foundation*, 496 F.2d 623, 635 (2d Cir. 1974) ("conduct which is part private and part governmental must be more strictly scrutinized when claims of racial discrimination are made"); *Wahba* v. *New York University*, 492 F.2d 96, 100 (2d Cir. 1974) (state action determinaton depends in part on which provision of the Bill of Rights is alleged to have been violated).

tiffs in this suit, however, are not the intended beneficiaries of the service for which the state has contracted with the school. The school's authority over its faculty derives from the contractual relationship of employment, not from "state law." The school does not perform any public function toward them, even if it may (although we do not now decide the issue) perform such a function toward some or all of its students.

Nor are we persuaded by the argument that the relationship between the school and the state is mutually beneficial, or "symbiotic," as was found to be the case in *Burton*.[22] Any contractual relationship is beneficial to both contracting parties; otherwise they would not enter into it. As we read *Burton*, the importance of the mutually beneficial relationship was that the state benefited from the particular conduct under attack — the racial discrimination by the restaurant — at least to the extent that that conduct increased the restaurant's business and bolstered its ability to pay rent to the state. We see no such benefit to the state from the conduct under attack here.

The school's funding, regulation, and function all show a relationship of close cooperation with the state. But these factors, together as well as separately, do not demonstrate that the state has so dominated the school as to make all the school's actions, and particularly those related to personnel, attributable to the state.[23] The school's management by a private

[22] We note that the phrase "symbiotic relationship" does not appear in *Burton* at all. That phrase originated with the Court's discussion of *Burton* in its opinion in *Moose Lodge*, 407 U.S. at 175, and was repeated in the same context in *Jackson*, 419 U.S. at 357.

[23] We have found only two cases at the circuit court level involving the combination of factors present here. In *Ginn* v. *Mathews*, 533 F.2d 477 (1976), the Ninth Circuit found the fifth amendment applicable to the discharge of employees by a federally and state-funded and regulated Head Start program. There, however, hiring and firing were under the control of a Board of Directors, the composition of which was controlled in part by the regulations. *Compare Kelley* v. *Action for Boston Community Development*, 419 F. Supp. 511 (D. Mass. 1976) (finding no governmental action in the

Board of Directors on which the state is not represented, and the broad range of independent discretion which these directors appear to exercise, particularly in personnel matters, belie the notion of state domination.

The five plaintiffs in case No. 80-1451 rely solely on the overall relationship between the school and the state, and, unlike Ms. Rendell-Baker in case No. 80-1328, *infra*, do not claim any direct involvement of the state in their discharge. For the above reasons, we hold that the district court erred in case No. 80-1451 in denying the school defendants' motion to dismiss. Ms. Rendell-Baker does claim state action even in the absence of an overall state dominance of the school. Her case therefore requires further discussion.

IV.

Ms. Rendell-Baker's arguments are essentially two: first, that because her position was created and funded through the grant of a state agency, she was a public employee even if the other staff members were not; and second, that the Committee directly reviewed and approved her discharge, as evidenced by its exchange of letters with the school. Ms. Rendell-Baker's first argument fails to distinguish her from many other employees of private organizations whose positions are funded by grants from government agencies, foundations, and even private corporations. It is common practice for universities, schools, hospitals, and community organizations to seek and obtain funding for specific positions through grants from these various public and private sources. The individuals employed are not treated as employees of the funding source; rather, they are employees of the grantee. Nor does Ms. Rendell-Baker

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discharge of a Head Start employee). In *Hines* v. *Cenla Community Action Committee, Inc.*, 474 F.2d 1052 (1973), the Fifth circuit found no federal responsibility for the dismissal, by a privately appointed board of directors, of the executive director of a community action agency which was funded and regulated by the Office of Economic Opportunity.

suggest that she was ever treated, or ever considered herself, an employee of anything but the New Perspectives School. She was chosen for the position and supervised in it by the school's administration, and we have no reason to suspect that she ever had any dealings with the Committee on Criminal Justice or the Town of Brookline until after her discharge.[84]

Ms. Rendell-Baker's second argument carries somewhat more weight. The exchange of letters, which we have summarized in our statement of facts, between the school and the Committee suggests that at least the one Committee official who wrote the letters viewed himself as having some authority to oversee the manner in which the school discharged an employee funded by the grant. Moreover, that official ultimately did determine that the school's procedure met some undefined standard for approval by the Committee. But the Committee's letters do not cite any authority for this oversight, and we have found none in the school's contract with the Committee. The contract provides that the Committee must approve hiring; it makes no provision for approval of firing, nor does it require that any particular personnel policies be observed. If, as defendants' affidavit asserts (and as Ms. Rendell-Baker has not contested), the Committee's approval of hiring consisted only of reviewing the qualifications of the school's chosen candidate, then the Committee had authority to deny its approval for the hiring of a replacement only if it found the candidate's qualifications inadequate, and for no

[84] As we indicated in footnote 8, *supra*, a grant manager of the Committee did report that Ms. Rendell-Baker was considered an employee of the Town of Brookline. But since the grant manager did not elaborate on this observation or cite any evidence for it, and since Ms. Rendell-Baker obviously did not consider herself an employee of the Town (her counsel admits that she did not even know of the Town's involvement in the funding arrangement until discovery), the grant manager must have been mistaken.

other reason. Nothing in the contract suggests that the Committee is allowed to control the school's personnel policies by exercising its approval powers arbitrarily, as a form of leverage.

The district court's judgment in No. 80-1328 is affirmed.

The district court's order in No. 80-1451 is reversed, and the matter remanded with directions that judgment be entered in that case dismissing the complaint.

Adm. Office, U.S. Courts — Blanchard Press, Inc., Boston, Mass.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SHEILA RENDELL-BAKER,
Plaintiff,

v. CIVIL ACTION
NO. 77-2236-C

SANDRA KOHN, et al.,
Defendants.

MEMORANDUM

April 16, 1980

CAFFREY, Ch. J.

In 1977 plaintiff, Sheila Rendell-Baker filed this action alleging that she had been discharged from her position as vocational counselor at New Perspectives School, Inc. in Brookline, Massachusetts in violation of her rights under the First, Fifth and Fourteenth Amendments and 42 U.S.C. §1983. Plaintiff invoked the jurisdiction of this court pursuant to 28 U.S.C.A. §§ 1331, 1343, 1361 and 2202.

The complaint as amended names as defendants, New Perspectives School, Inc., the members of that school's board of directors both individually and in their "their official capacities" (hereinafter the school defendants), as well as Francis X. Bellotti, Chairman of the Massachusetts Committee on Criminal Justice (hereinafter the Committee) and Robert J. Kane[1], Executive Director of the Committee (hereinafter the State defendants).[2]

The matter is currently before the court on a motion for summary judgment filed by defendants Bellotti and Highgas. In support of their motion the state defendants argue that the court has no

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[1] Mr. Kane has since been replaced as Executive Director by William Highgas, Jr. who is now defending this action.

[2] Although two federal defendants were named in the original complaint, their motion to dismiss was allowed by the Court in 1979.

subject matter jurisdiction over the controversy because the plaintiff's termination was not sufficiently imbued with with state action to trigger constitutional safeguards. They further argue that even if the court does find that the complained of actions were "under color of state law", the State defendants cannot be charged with responsibility for the plaintiff's dismissal. Plaintiff opposes the motion and the parties have submitted affidavits to the court in support of their respective positions.

It is assumed for purposes of this motion that the Plaintiff was dismissed as a result of a legitimate exercize of her free speech and that her dismissal was not accompanied by the procedural safeguards which would be required if the action were attributable to the State. It is also conceded that at all times pertinent to

the complaint, the School was subject to extensive state regulation and was the recipient of substantial public funding.

New Perspectives School, Inc. is incorporated under the laws of the Commonwealth of Massachusetts and operates as an alternative high school for students who have trouble functioning in a traditional high school setting. It is funded in large part by local, state and federal sources and is subject to extensive governmental regulation. At all times pertinent to the complaint New Perspectives School was the recipient of funds from the Massachusetts Committee on Criminal Justice and the position of the plaintiff as vocational counselor was funded by that particular source.

The Massachusetts Committee on Criminal Justice was established pursuant to Mass. Gen. Laws, ch.6, §156 and is

comprised of various State officials and appointees. As one of its duties the Committee accepts funds from the Law Enforcement Assistance Administration (hereinafter LEAA) and awards subgrants to eligible applicants within the state.

Plaintiff argues that the Commonwealth of Massachusetts is so thoroughly intertwined with the day to day functions of the school as to warrant the conclusion that any action taken by the school is state action.[3] Plaintiff

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[3]Plaintiff asserts that the state action requirements may be satisfied even in the absence of a nexus between the state and the challenged activity. In so arguing she relies on Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) and the language of the Court of Appeals for the First Circuit in Berrios v. Inter American University, 535 F.2d 1330 (1976). This Court accepts the correctness of the legal principles enunciated by plaintiff especially in light of Downs v. Sawtelle, 574 F.2d 1 (1st Cir. 1978) cert. denied 439 U.S. 910 (1978). However, the allegations of state involvement in the general management of the school which appear in the

(footnote 3 cont'd on next page)

points to the substantial state funding provided to the school and the extensive state regulation to which the school is subject. Plaintiff also maintains that the school performs a traditionally public function in that it provides its students with a free education, provides a non resident drug treatment program and generally furthers the goals of the State's criminal justice system. Plaintiff further argues that the school could not have terminated her employment without the approval of the Committee.

The State defendants argue that the School does not perform a traditionally public function and that substantial state

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(footnote cont'd from previous page)

complaint and in the additional materials submitted for purposes of opposing this motion, do not approach a level of involvement which would suggest that a symbiotic relationship may have existed between the school and the state. Further discussion on that issue is therefore unwarranted.

funding and regulation alone do not necessarily give rise to a finding of state action. They maintain that there must be direct state involvement with the complained of activity. The State defendants further argue that although the Committee plays a role in the hiring[4] of personnel, it has nothing to do with post hiring personnel decisions. Thus, they conclude, that there can be no direct

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[4]Applications to the Committee for the award of a subgrant must provide the Committee with a program description which contains the job qualifications and responsibilities of staff hired in the course of implementing the program. If a subgrant application is approved, that program description is incorporated into a standard contract which also contains certain conditions incident to funding. One such condition is that the "[p]rior approval of the committee is required for staff hiring. . ." Such approval usually consists of a review whether the qualifications stated therein are consistent with the qualifications which were proposed by the applicant (in this case New Perspectives School, Inc.) and approved by the Committee. The Committee does not conduct job interviews.

state involvement in the activity complained of in this case.

"A cause of action under § 1983 requires that a state, not a private party, act to deprive one of constitutionally protected rights." Berrios v. Inter American University, supra at 1331. There are occasions however when the actions of a private party may be attributed to the state. Burton v. Wilmington Parking Authority, supra.

While the court agrees with the defendants that New Perspectives School, Inc. does not perform a uniquely public function, some further discussion is necessary on the issue of whether the state involvement here went beyond substantial funding and extensive regulation and extended to the complained of activity itself.

> Our inquiry must be, as the court put in Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351, 95 S. Ct. 449, 453, 42 L.E. 2d 477 (1974) "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.

Lamb v. Rantoul, 561 F.2d 409 (1st Cir. 1977), Krohn v. Harvard Law School, 552 F.2d 21 (1st Cir. 1977).

Although the recipients of funding are subject to the rules, regulations and directives of the committee and although the committee may impose special conditions in a given case, there are no regulations or conditions in the case at bar which relate to the suspension or termination of individuals employed by the school. The Committee does play a role however in the decision to hire personnel. In a letter dated February 23, 1977 the

school was informed by the Committee's General Counsel, Mr. Tobin:

> While the Committee makes no comment on the matter, [plaintiff's termination], you are advised that no candidate to fill the subject position will be approved until such time as you provide me with written justification of your action, specifically citing any rules and regulations under which the action was taken.

In two subsequent letters the school outlined both its reasons for the decision to terminate the plaintiff's employment and the termination procedures which it had followed. Although satisfied with the School's outline, Mr. Tobin cautioned the School as follows:

> You are advised, however, that if you move to fill the vacant position and you choose to expend funds, you will not have LEAA money available to meet a successful claim for back pay by Ms. Rendell-Baker. Payment of such a claim would be allowable to the extent that the salary remains unexpended. LEAA funds may not be used to pay any other form of damages or any fines or penalties

that might be levied against the New Perspectives School, Inc.

I rule that the decision as to whether or not the plaintiff's employment should be terminated and the decision as to whether or not she should be replaced are two separate and distinct matters. The former was a determination to be made by the School alone. The Committee was involved only with the latter. There is no indication in the case at bar that the power of New Perspectives School, Inc. to terminate its employees was in any way "circumscribed" by the Committee. See McQueen v. Druker, 438 F.2d 781, 784-85 (1st Cir. 1971).

On the basis of the foregoing I rule that there was no state action because there was not a "sufficiently close nexus" between the committee and plaintiff's termination upon which this court may base a ruling that the actions of the school

are properly attributable to the state for purposes of federal jurisdiction.

The State defendants' motion should be allowed. A fortiori the action should be dismissed as to all remaining defendants.

Order Accordingly.

/s/Andrew A. Caffrey
Andrew A. Caffrey, Ch. J.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SHEILA RENDELL-BAKER,
Plaintiff,

v. CIVIL ACTION
NO. 77-2236-C

SANDRA KOHN, et al.,
Defendants.

ORDER

April 16, 1980

CAFFREY, Ch. J.

In accordance with memorandum filed this date, it is ORDERED:

The action is dismissed against defendants Highgas and Bellotti.

The action is dismissed to all remaining defendants.

/s/Andrew A. Caffrey
Andrew A. Caffrey, Ch. J.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WAYNE KLUG, et al,
Plaintiffs
v.
THE NEW PERSPECTIVES SCHOOL, INC., et al,
Defendants

Civil Action
No. 78-2402-MA

MEMORANDUM AND ORDER

Mazzone, D.J. April 7, 1980

The plaintiffs, five teachers at a publicly funded private high school, claim that they were wrongfully discharged without due process for exercising their protected right to freedom of speech, in violation of the First, Fifth and Fourteenth Amendments and 42 U.S.C. §1983. They claim jurisdiction under 28 U.S.C. §§1331 (federal question), 1343 (civil rights) and 1361 (mandamus for federal official). The case is before the Court on the defendants' motion to dismiss. The

threshold jurisdictional question is whether the defendants, the New Perspectives School, its Staff Director and Board of Directors, acted under color of state law.[1] Because this question can be answered only after carefully "'sifting facts and weighing circumstances,'" Lorentzen v. Boston College, 440 F. Supp. 464, 465 (D.Mass. 1977), aff'd. 577 F.2d 720, cert. denied, 440 U.S. 924 (1979)

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[1]The free speech rights which plaintiffs claim have been violated are considered fundamental for purposes of equal protection analysis and are subject to strict judicial scrutiny in that context. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312 n. 3 (1976). We therefore do not address the issue of whether less offensive conduct would be a less appropriate subject for our scrutiny, Weise v. Syracuse University, 522 F.2d 397, 406 (2nd Cir. 1975), an approach which has not been endorsed by this Circuit. Downs v. Sawtelle, 574 F.2d 1, 6 n. 5 (1st Cir. 1978), cert. denied, 439 U.S. 910. Because fundamental rights are involved, whether the School is a "state actor" is a threshold question. Id. at 6.

(quoting Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961), the facts are set forth in some detail and are examined in the light most favorable to plaintiffs. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

New Perspectives School is a non-profit Massachusetts corporation. It contracts with governmental agencies to provide tuition-free education for about fifty students who have had difficulty in public high school. Most students have drug-related problems or other special needs. The School provides night classes, extensive counseling services, and vocational placement services. As Staff Director, the defendant, Sandra Kohn, is responsible for the day to day operation of the School, including initial hiring and discharge decisions. In practice,

Kohn sometimes discusses hiring decisions with the staff. The Board of Directors has the ultimate authority to make any decisions affecting the school.

Some students drawn from the Town of Brookline and the City of Boston receive special educational services under Chapter 766 of the Massachusetts Acts of 1972 (Mass. Gen. Laws c. 71B). Others are placed in the School by the Drug Rehabilitation Division of the Massachusetts Department of Mental Health. The School, which is located in Brookline, is authorized to issue high school diplomas which are certified by the Brookline School Committee. The Town itself does not maintain facilities to meet the needs of Chapter 766 students. The School must comply with certain town and state regulations concerning minimum curriculum

requirements, total credit requirements and teacher certification requirements. The curriculum of an institution which accepts Chapter 766 referrals must "be equivalent, insofar as the department [of education] deems feasible, to the curriculum for children of comparable age and ability in the public schools." Mass. Gen. Laws. c. 71B, §10. New Perspectives is also subject to Chapter 766 guidelines which establish minimum student-teacher ratios, set policies for teachers' use of physical restraint and isolation to discipline students, require teachers of academic subjects to hold a bachelor's degree (although teachers need not be state-certified), and require that a contracting school set forth its policies for hiring and discharging personnel in writing. A local school committee, not the

contracting institution, determines what services should be provided for each student in a written plan.

The School is also regulated by the terms of its contracts. The Department of Mental Health requires the School to comply with standards established for Drug Treatment Facilities, to accept court referrals, and to grant access to the Department to review student and financial records. The contract with the Boston School Committee likewise gives the Committee the right to inspect the School. If the Committee is dissatisfied with the services, the School may replace them or the Committee may obtain them elsewhere and charge the School. The contract specifies that agents of the School are not "city employees" and that the School

must maintain its own workers' compensation insurance.

The School obtains 85% of its funds directly or indirectly from the Commonwealth, 8% from the federal government (CCJ, LEAA) and 7% from private sources. The Department of Mental Health each month reimburses the School for a fixed amount of expenses, incurred primarily for staff salaries. The Boston School Committee pays a weekly rate fixed by the Commonwealth for each student referred by it under Chapter 766.

It does not appear that the Commonwealth or any of its subdivisions is represented on the Board of Directors or may otherwise control the internal operations of the School, except by withdrawing students, funds or accreditation. The Staff Director's hiring and firing decisions are not subject to state or public

approval or review. The school has experimented with using a student-staff council for self-government, without the approval or participation of the Commonwealth.

For more than a year before plaintiffs were discharged, New Perspectives School had been plagued by discord among staff and students, "manifested by the resignation of over half the faculty...and racial antagonism." Complaint ¶20. On May 22, 1978, the plaintiffs wrote to the Board requesting Kohn's resignation. The letter briefly described problems with staff fragmentation, student drug abuse, and poor morale. It charged that Kohn's poor administration caused these problems in five enumerated respects. The plaintiffs stated that they had discussed the matter with her to no avail. The other

eight teachers and the assistant administrator supported Kohn. The following day, the Board gave Kohn a vote of confidence.

On June 5, 1978, students picketed the Brookline home of the defendant James Schlesinger, president of the Board, to protest conditions at the School and to request Kohn's resignation. On June 6, Kohn directed the staff to tell students that Schlesinger had said that the picketing constituted a disturbance in his neighborhood, that creating a disturbance was against Board policy, and that students who picketed would therefore be suspended. The plaintiffs carried out her request. That same day, the plaintiffs also submitted to the Board a twenty-two page joint affidavit detailing their criticisms of Kohn and requesting her removal. They did not then vent their

complaints about working conditions, but addressed only problems which they attributed to Kohn.

Kohn met with the plaintiffs on June 8. They informed her that two of them had met with a lawyer, who apparently advised them that the "no picket" order was unconstitutional, and that they might subject themselves to civil liability for instructing students to follow the order. Kohn later met individually with each plaintiff, re-affirming the no-picket order and instructing plaintiffs not to tell the students they believed the order was unconstitutional, lest she have to take "appropriate action." Kohn felt that because the student body was so unstable, often coming from broken homes, it was necessary for the staff to present a united front and act as a group authority

figure, as well as to provide individual role models.

On June 15, 1978, a letter from the plaintiffs appeared in the Brookline Chronicle, refuting statements of some Board members which had appeared in a previous article and stating the plaintiffs' belief that the no-picket order was unconstitutional and that their own first amendment rights had been violated. The same day, they informed Schlesinger as president of the Board that they were forming a labor organization.

Kohn discharged four of the plaintiffs on June 16. The fifth plaintiff, Dawn Fonesca, had submitted a letter of resignation dated May 16, 1978. She advised Schlesinger that she wanted to withdraw it on June 8, but he accepted her resignation on June 9. Kohn told the

plaintiffs they were discharged for insubordination and disruption of the School's program. No warnings had been given, no hearing was held and no written statement of the reasons for discharge was made. Plaintiffs' personnel records reflect the charges of insubordination.

The School could be considered a state actor either on the theory that it is a public institution or on the theory that the nexus between the challenged activity and the Commonwealth's involvement is sufficiently close so that the action of the School may be fairly treated as that of the state itself. Krohn v. Harvard Law School, 552 F.2d 21 (1st Cir. 1976); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). That an entity performs a public function does not elevate

all its activities to state action, although public function is one factor to be considered on the question of state action. Id. at 351.

Cases in this Circuit have focused primarily on the extent of state control over the private party and the challenged activity. Downs v. Sawtelle, 574 F.2d 1 (state action existed in physician's sterilization of plaintiff where the entire board of a hospital's directors was initially appointed by the town, Medicare funds provided 30% of its budget and it was subject to "significant" governmental regulation); see also, Krohn v. Harvard Law School, 552 F.2d 21; Berrios v. Inter American University, 535 F.2d 1330 (1st Cir. 1976); Fortin v. Darlington Little League, 514 F.2d 344 (1st Cir. 1975)(state action found in "symbiosis" where Little League used six of town's eight baseball

diamonds, though no state funding or control). The Ninth Circuit, in Ginn v. Mathews, 533 F.2d 477 (1976), found state action by a "private" school maintained for Headstart students, relying on this Circuit's McQueen v. Drucker, 438 F.2d 781 (1st Cir. 1971).

The New Perspectives School appears to serve a primarily public function. Although education is not a "uniquely" public function, Lorentzen v. Boston College, supra, 440 F. Supp. at 465, New Perspectives, unlike the college in Lorentzen serves only students who are entitled by law to receive a carefully tailored high school education from the Commonwealth.

We believe the rationale of McQueen v. Drucker, supra, should be applied here.

The School performs a governmental function because it provides a high school education, as required by and at the expense of the Commonwealth. While there is no direct control by the state over the private firm, and no control over the challenged activity, the programs it offers must comply with state regulations, its staff must meet certain degree requirements, and there is substantial state oversight of its operation. Accordingly, we are of the opinion that there is sufficient involvement by the state to meet the jurisdictional challenge under the "public institution" approach.

We do not accept the defendants' contention that plaintiffs have alleged no deprivation of rights protected by the Constitution or laws of the United States.

The motion to dismiss is denied.

SO ORDERED.

/s/ A. David Mazzone
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

WAYNE KLUG, ET AL	*	EXHIBIT "B"
	*	
v.	*	No. 78-2402-MA
	*	
THE NEW PERSPECTIVES SCHOOL, INC., ET AL	*	

ORDER

IT IS ORDERED that this Court's Memorandum and Order, dated April 7, 1980, which denies defendants' Motion to Dismiss, shall be amended to include the following statement:

> Whether or not defendants should be regarded as state actors is a controlling question of law in this case. While this Court has found that there is sufficient involvement with New

Perspectives School, Inc. by the state to regard the defendants' actions as state action, there is substantial ground for difference of opinion on this point. It is, therefore, this Court's opinion that an immediate appeal from this interlocutory order may materially advance the ultimate termination of this litigation.

/s/ A. David Mazzone
A. David Mazzone
U. S. District Court
Judge

/s/ Helen M. Costulo
Deputy Clerk

Date: June 13, 1980

"MANDATE" [C.A. 77-2236-C]

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 80-1328 [DOCKETED]

SHEILA RENDELL-BAKER,
Plaintiff, Appellant,

v.

SANDRA KOHN, ET AL.,
Defendants, Appellees.

FILED
IN CLERK'S OFFICE
MAR 5 4:25 PM '81
U.S. DISTRICT
COURT
DISTRICT OF
MASSACHUSETTS

JUDGMENT

Entered February 12, 1981

This cause came on to be heard on appeal from the United States District

Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

Costs in favor of appellee, The New Perspective [sic] School, Inc. are taxed at $51.30.

Certified and issued as informal mandate under F.R.A.P. 41 on MAR 5 1981

/s/ Dana H. Gallup
Clerk

By the Court:

/s/ Dana H. Gallup
Clerk

[cc: Messrs. Doyle, Feinberg and Pressman and Ms. Waxman.]

A-60

"MANDATE"

United States Court of Appeals

For the First Circuit

[FILED IN
CLERK'S OFFICE
MAR 11 10:58 AM
'81
US COURT OF AP-
PEALS
FOR THE FIRST
CIRCUIT]

No. 80-1451

WAYNE KLUG, ET AL.,
Plaintiffs, Appellees,

v.

THE NEW PERSPECTIVES SCHOOL, INC., ET AL.,
Defendants, Appellants.

JUDGMENT

Entered February 12, 1981

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the district court is vacated and the matter is remanded to that court with directions that judgment be entered in that case dismissing the complaint.

Costs to appellants.

Costs in favor of appellants are taxed at $455.60.

Certified and issued
as informal mandate
under F.R.A.P. 41 on
MAR 11 1981

/s/ Dana H. Gallup
Clerk

By the Court:

/s/ Dana H. Gallup
Clerk

[cc: Messrs. Doyle, Feinberg and Pressman and Ms. Waxman.]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BNA
Date Filed: 5-6-81
Date Received: 5-12

----------x

SUZANNE ROSS,
Plaintiff,

80 Civ. 3422(RWS)
OPINION

-against-

NATHAN ALLEN [correct name NIATHAN ALLEN], Executive Director of Henry Street Settlement, WILLIAM SPILLER, Director of Henry Street School, and ROBERT WOLF, Clinical Director of Henry Street School,
Defendants.

----------x

APPEARANCES:

NEW YORK CIVIL LIBERTIES UNION
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By: STEVEN R. SHAPIRO, ESQ.
ROBERT M. LEVY, ESQ.
Of Counsel

DOUGLAS F. EATON, ESQ.
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New York, New York 10022

Sweet, D.J.

Plaintiff Suzanne Ross ("Ross") brought this civil rights action against the defendants, directors of the Henry Street Settlement ("the Settlement") and the Henry Street School ("the School"), alleging that they violated certain of her constitutional and statutory rights by terminating her employment as a school psychologist after she complained to the Board of Education about their suspension of one student at the school. The case is before me on a motion to dismiss, brought pursuant to Rule 12 (b)(6), Fed.R.Civ.P. The motion is denied in part and granted in part.

The complaint alleges the following facts.

The School was established and operates as a school for handicapped children.

Most of its students are placed there by the New York City Board of Education ("the Board") pursuant to a contractual agreement. The Board retains responsibility for the students' education. It monitors and regulates the School's programs. The School receives substantial government funding, which is channelled to it through the Board as conduit. Some of its facilities are located in government buildings.

Ross was hired by the School in October, 1979. She is a psychologist, whose duties at the School included "psychological evaluation, psychotherapy, and teaching."

In late March of 1980, one of Ross' students was told by officials at the School to stay home indefinitely because of certain behavior problems. The student had no hearing and was not formally

suspended. When Ross learned of this action, she spoke with the defendants. She told Robert Wolf ("Wolf") that her clinical judgment was that it was in the child's best interest to remain in school. She also told the defendants that the School had acted illegally. She read the applicable law to Wolf.

In the face of the defendants' inaction, Ross advised the student and her mother of the student's procedural rights. She also contacted the Child Advocacy Project of the New York City Board of Education, which agreed with Ross about the alleged infraction of the student's rights. Two days later, on April 24, 1980, the School reversed its position and reinstated the student. According to the allegations of the complaint, the student had missed ten days of school. Also on

April 24, Ross was dismissed. She was given two reasons for her dismissal, one, that she had contacted the Board of Education, an "outside agency," about the School's allegedly illegal activities, and two, that she had assumed an inappropriate role as child advocate. Plaintiff appealed that dismissal through internal administrative channels; however, that appeal was unsuccessful.

For purposes of this motion to dismiss, the preceding recitation of facts taken from Ross' complaint is taken as true. See California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972).

Based on these alleged facts, Ross asserts three separate causes of action. First, she asserts a cause of action under 42 U.S.C. § 1983 for violation of her

First and Fourteenth Amendment rights. Second, she alleges that her rights under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 and regulations promulgated thereunder were infringed by her dismissal. Finally, she claims that defendants' actions violated her rights under the Education for All Handicapped Children Act, 20 U.S.C. § 1401, et. seq., (EAHCA) and applicable regulations.

Defendants challenge the legal sufficiency of the complaint on all three grounds. As to the first cause of action, they maintain that the requisite state action to sustain a claim under § 1983 is lacking. As to the second cause of action, they claim that § 504 is inapplicable here because no discrimination on the basis of handicap is alleged. In addition, as to both the second and third

causes of action, defendants contend that Ross lacks standing under the statutes and regulations she invokes.

On a motion to dismiss, "the sole issue is whether under the facts alleged in the plaintiff's complaint it appears to a certainty that the plaintiff is entitled to no relief." Holmes v. Silver Cross Hospital of Joliet, 340 F. Supp. 125, 130 (N.D. Ill. 1972). Under the first two causes of action alleged here, in accordance with the facts as pleaded, Ross may be able to establish entitlement to relief. However, I agree with the defendants that she lacks standing to sue under EAHCA. Accordingly, at this stage of this litigation, I reject defendants' challenge to the legal sufficiency of Ross' first two claims, but grant the motion to dismiss the third.

It is true, as defendants assert, that on her first cause of action plaintiff has the burden of proving that her dismissal was the result of state action. See Jensen v. Farrell Lines, Inc., 625 F.2d 379, 384 (2d Cir. 1980), cert. denied, __ U.S. __, 101 S.Ct. 1359 (1981). However, under this complaint she may be able to carry that burden in accordance with the "state-function" approach to determining state action. Under this approach a court may find state action if "the conduct of the private actor is equivalent to the performing of a state function, or is traditionally associated with sovereignty." Id.

Application of the state function test is problematic. However, light may be shed on the instant case by a comparison of two cases in this Circuit,

Perez v. Sugarman, 499 F.2d 761 (2d Cir. 1974) and Lefcourt v. Legal Aid Society, 445 F.2d 1150 (2d Cir. 1971).

Perez was a civil rights action alleging constitutional infringements by, among others, two private child care institutions, the New York Foundling Hospital and St. Joseph's Home for Children. The complaint alleged unconstitutional detention of the plaintiff's children. The court applied the state function test and found that the institutions acted "under color of state law," and were therefore open to suit under § 1983. In doing so, it placed primary reliance on the statutory scheme involved. Under that scheme, the government was charged with primary responsibility for the welfare of needy children, but could discharge that responsibility either

directly or through an authorized agency. The defendant institutions were such authorized agencies. The court found that although it had entrusted the plaintiff's children to those private institutions, the state was "in effect providing the care through [those] institutions," Perez, supra, at 765, and concluded that "[t]his exercise of the administrative placing prerogative does not affect in any way the State's ultimate responsibility for the well-being of the children, and, consequently, the public nature of the function being performed." Id.

In Lefcourt, the plaintiff alleged that his dismissal from service as a Legal Aid Society ("Society") attorney abridged his First and Fourteenth Amendment rights. The Second Circuit affirmed the district court's dismissal of the complaint,

finding that the Society did not perform a public function for purposes of § 1983. The court emphasized the autonomy of the Society, and the fact that its primary duty was to its clients, not to the city. It also stressed the fact that legal representation of criminal defendants is traditionally a private, not a public function, notwithstanding the fact that the state might be forced to assume responsibility for indigent defendants in the absence of organizations such as the Society. See also Graseck v. Mauceri, 582 F.2d 203 (2d Cir. 1978), cert. denied, 439 U.S. 1129 (1979).

This case more closely tracks Perez than Lefcourt. The statutory scheme involved here is, in all relevant respects, indistinguishable from that relied upon by the court in Perez. Under New York

Education Law §§ 4401 et seq., the state has the duty to provide for the educational needs of handicapped children. It can fulfill that duty either through operating programs in the public schools or through contracting with private institutions, but it retains responsibility for the provision of educational services regardless of the means by which they are provided. See N.Y. Education Law § 4402 2.a. Contracts with private institutions are subject to approval by the State Commissioner of Education. Those institutions receiving public financial assistance are subject to inspection by the state.

The Henry Street School operates within this statutory framework. At this stage of this litigation, it would therefore appear to stand in a legal posture

similar to that assumed by the private child care institutions in Perez. Here, as in Perez, it would appear that the state in effect provides the mandated care through the private institution with which it contracts.[1]

Lefcourt is distinguishable in several respects. The School, unlike the Society, is subject to monitoring and regulation and is far from autonomous. Although the issue remains unsettled, education, unlike legal representation, appears to be treated as a more characteristically governmental than private

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[1] Rendell-Baker v. Kohn, No. 80-1451 (1st Cir. 1981), on which defendants rely, is distinguishable. It is not clear from the opinion whether the statutory scheme involved there contemplates retention of responsibility by the state, and the decision does not turn on that factor. Here, by contrast, as in Perez, the state retains responsibility for the provision of the services involved.

function for purposes of state action analysis. See generally Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 163 (1978)(education acknowledged to be more of a public function than dispute resolution, though degree to which states can delegate educational functions and thereby avoid Fourteenth Amendment strictures undecided).

Under Perez, because of the statutory scheme outlined above, and primarily because of the primary responsibility for the education of the handicapped retained by the state, I find that under the allegations of this complaint plaintiff may be able to prove that the actions of the School were state actions. She may therefore be able to sustain a cause of action under § 1983. The motion to dismiss the first cause of action in this complaint is

therefore denied. This denial, of course, in no way suggests pre-judgment of the merits of plaintiff's First Amendment claim. A determination regarding the protection afforded Ross' speech and the factors actually involved in her dismissal must await trial. See generally Snepp v. United States, 444 U.S. 507 (1980); Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977); Pickering v. Board of Education, 391 U.S. 563 (1968).

As stated above, the second and third causes of action, the statutory claims, are challenged primarily on standing grounds. The § 504 claim is assailed for the additional reason that the complaint is said not to allege discrimination on the basis of handicap.

At this stage of this proceeding, it is not possible to say with certainty that under this complaint, plaintiff may not be able to prove discrimination on the basis of handicap. It may be that the theory of plaintiff's case will be, and the evidence will show, that the student's behavioral problems that prompted her suspension were linked to her handicap. Such a theory and such proof would support a claim of discrimination on the basis of handicap. See S-I v. Turlington, No. 79-2742 (5th Cir. 1981).

However, even if that is not the nature of plaintiff's claim or proof, it is possible that she may make out a cause of action under § 504 and the regulations promulgated thereunder through other theories and proof not yet advanced. Furthermore, under that statute and those

regulations, I find that she has standing, for the reasons that follow.

A regulation promulgated under § 504 of the Rehabilitation Act mandates that certain procedural rights be afforded handicapped children. See 45 C.F.R. § 84.36. That regulation is buttressed by the incorporation by reference of the anti-retaliation provisions of Title VI of the Civil Rights Act of 1964, see 29 U.S.C. § 794a (2), 45 C.F.R. § 84.61. Under those provisions, Ross, as one who complained of an alleged violation of the Act, is protected against the kind of retaliation her complaint alleges. Because she is in the "zone of interests" meant to be protected by § 504 and these regulations and because she has suffered "injury in fact," Ross has standing to raise a claim under these provisions. See

Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970).

No comparable regulation has been promulgated under the Education for All Handicapped Children act. Despite that, plaintiff argues that an anti-retaliation rule should be implied. She points to the likelihood that the handicapped will lack the knowledge necessary to protect themselves and argues that protecting those who seek to vindicate the rights of the handicapped will ultimately safeguard the handicapped themselves. Plaintiff contends that under this "child benefit theory," she has standing under EAHCA to complain that her dismissal resulted from her attempts to challenge what she saw as a violation of her student's procedural rights.

No cases dealing with this issue and decided under EACHA have been cited to or found by the court. Plaintiff relies on Forrest v. Ambach, Sept. 26, 1980, cal. Nos. 12, 41 (Sup. Ct. Albany Co. Dec. 11, 1980), in which a school psychologist, proceeding under N.Y. Education Law § 310, was found to have standing to contest her dismissal on the ground that it had been motivated by her attempts to comply with the law by providing statutorily mandated evaluations of students, her attempts to protect other rights of handicapped students, and her efforts to expose the school's neglect of its own statutory duties. The court found that the commissioner had been wrong in refusing to consider the petitioner's allegations concerning the reasons for her dismissal. The commissioner's refusal was based on

his determination that the petitioner "lacked standing to challenge respondent's alleged neglect of their statutory duties regarding handicapped children." In overturning the commissioner's decision, the court found that according to petitioner's complaint the respondents' alleged neglect of their statutory duties and disapproval of petitioner's attempts to expose that neglect and fulfill her own duties had resulted in harm to the petitioner. Therefore the court concluded that Forrest had standing.

This case is not on all fours with Forrest. Here, there is no allegation that Ross was fired for acts she was required by law to perform. Ross was not under a statutory duty to inform the student or her parents of their procedural rights. Such a requirement might very

well carry with it legal protection for those performing their duties, but no such requirement is present here.[2]

Ross also argues that the court should imply an anti-retaliation provision here because "almost every civil rights law enacted by Congress in the past twenty years ... contains an anti-retaliation provision either in the statute itself or the implementing regulations." That fact could just as well lead to a conclusion contrary to that which Ross would have me draw. Congress and the administrative agencies have been quite explicit in other

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[2]Ross also relies on Caulfield v. Board of Education of the City of New York, 583 F.2d 605 (2d Cir. 1978). Caulfield does not support her. The issue in Caulfield was not the standing of the teachers, as Ross asserts, but the jurisdiction of the administrative agency. The "child benefit theory" supported that jurisdiction, not the standing of the plaintiffs.

contexts when seeking to afford protection against retaliation. That they did not explicitly do so here could evince an intent to limit the scope of the statute's protection. It could evince mere oversight. But in the absence of congressional or administrative guidance, this court will not imply a provision the legislative and regulatory draftsmen did not themselves adopt.

Finally, even if the School did violate a statutory duty to the student, that violation did not cause the injury Ross complains of here, that is, her dismissal. For that reason, too, I decline to recognize an implied cause of action on Ross' behalf under EAHCA. See Pavolini v. Band-Air Corp., No. 80-9017 (2d Cir. March 26, 1981).

Therefore, the motion to dismiss the third cause of action for lack of standing is granted. The motion to dismiss the first and second causes of action is denied.

IT IS SO ORDERED.

DATED: New York, N.Y.
May 6, 1981

/s/ Sweet
Robert W. Sweet
U.S.D.J.

COMPENDIUM OF STATE SPECIAL EDUCATION STATUTES

In addition to Massachusetts, each of the other forty-nine states has a statute providing for the publicly-funded special education of special needs, handicapped, or exceptional children:

Ala. Code §§ 16-39-1 to 16-39-12 (1975 & Supp. 1980); Alaska Stat. §§ 14.30.180 to 14.30.350 (1975); Ariz. Rev. Stat. §§ 15-1010 to 15-1018 (Supp. 1980); Ark. Stat. Ann. §§ 80-2101 to 80-2143 (1980); Cal. Educ. Code §§ 56000 to 56885 (West Supp. 1980); Colo. Rev. Stat. §§ 22-20-101 to 22-20-114 (1973 & Supp. 1980); Conn. Gen. Stat. Ann. §§ 10-76a to 10-76n (West Supp. 1980); Del. Code tit. 14, §§ 3101 to 3126 (Supp. 1980); Fla. Stat. Ann. § 230.23(4)(m) (West Supp. 1981); Ga. Code Ann. § 32-605a (1980); Hawaii Rev. Stat. § 301-21 to

301-27 (1976); Idaho Code §§ 33-2001 to 33-2006 (Supp. 1980); Ill. Ann. Stat. ch. 122, §§ 14.-1.01 to 14.-14.01 (Smith-Hurd Supp. 1980-81); Ind. Code Ann. §§ 20-1-6-1 to 20-1-6-29 (Burns Supp. 1980); Iowa Code §§ 281.1 to 281.12 (1981); Kan. Stat. §§ 72-961 to 72-981 (1980); Ky. Rev. Stat. §§ 157.200 to 157.285 (Supp. 1980); La. Rev. Stat. Ann. §§ 17: 1941 to 1958 (West Supp. 1981); Me. Rev. Stat. tit. 20, §§ 3121 to 3132 (Supp. 1980); Md. Educ. Code Ann. §§ 8-401 to 8-415 (Supp. 1980); Mich. Stat. Ann. §§ 15.41701 to 15.41766 (1979); Minn. Stat. § 120.17 (1980); Miss. Code Ann. §§ 37-23-1 to 37-23-157 (1972 & Supp. 1980); Mo. Ann. Stat. §§ 162.670 to 162.995 (Vernon Supp. 1981); Mont. Rev. Codes Ann. §§ 20-7-401 to 20-7-456 (1979); Neb. Rev. Stat. §§ 43-641 to 43-653 (1978 & Supp. 1979 & 1980); Nev.

Rev. Stat. §§ 395.001 to 395.060 (1979); N.H. Rev. Stat. Ann. §§ 186-A: 1 to 14 (Supp. 1979); N.J. Stat. Ann. §§ 18A:46-1 to 46-18.1 (1968 & West Supp. 1981); N.M. Stat. Ann. §§ 22-13-5 to 22-13-8 (Supp. 1980); N.Y. Educ. Law §§ 4401 to 4409 (McKinney Supp. 1980); N.C. Gen. Stat. §§ 115-363 to 115-410 (1978); N.D. Cent. Code § 15-59-01 to 15-59-09 (1971 & Supp. 1977); Ohio Rev. Code Ann. §§ 3323.01 to 3323.16 (Baldwin 1980); Okla. Stat. Ann. tit. 70, §§ 13-101 to 13-111 (West 1972 & Supp. 1980); Or. Rev. Stat. §§ 343.035 to 343.307 (1979); Pa. Stat. Ann. tit. 24, §§ 13-1371 to 13-1397 (Purdon Supp. 1981); R.I. Gen. Laws §§ 16-24-1 to 16-24-16 (1970 & Supp. 1980); S.C. Code §§ 59-33-10 to 59-33-90 (1977 & Supp. 1980); S.D. Compiled Laws Ann. §§ 13-37-1 to 13-37-24 (1975 & Supp. 1980); Tenn. Code Ann. §§

49-2902 to 49-2959 (1977 & Supp. 1980); Tex. Educ. Code Ann. tit. 2, § 16.104 (Vernon Supp. 1980); Utah Code Ann. §§ 53-18-1 to 53-18-8 (1970); Vt. Stat. Ann. tit. 16, §§ 2941 to 2954 (1968 & Supp. 1980); Va. Code §§ 22.1-213 to 22.1-222 (1980); Wash. Rev. Code Ann. §§ 28A.13.005 to 28A.13.080 (Supp. 1980); W. Va. Code §§ 18-20-1 to 18-20-6 (1977 & Supp. 1980); Wis. Stat. Ann. §§ 115.76 to 115.89 (West 1973 & Supp. 1980); Wyo. Stat. §§ 21-14-101 to 21-14-106 (1977).

COMPENDIUM OF PRIVATE SCHOOL PROVISIONS IN STATE SPECIAL EDUCATION STATUTES

In addition to Massachusetts, forty-one of the other forty-nine states provide for the performance of publicly-funded special education of special needs, handicapped, or exceptional children by private entities:

Ala. Code § 16-39-6(5) (1975); Ariz. Rev. Stat. § 15-1015(G) (Supp. 1980); Ark. Stat. Ann. § 80-2117 (1980); Cal. Educ. Code §§ 56365 to 56366.5 (West Supp. 1980); Conn. Gen. Stat. Ann. § 10-76d(d) (West Supp. 1980); Del. Code tit. 14, § 3124 (Supp. 1980); Fla. Stat. Ann. § 230.23(4)(m)(2) (West Supp. 1981); Ga. Code Ann. § 32-605 (a)(c)(1)(1980); Idaho Code § 33-2004 (Supp. 1980); Ill. Ann. Stat. ch. 122, § 14-7.02 (Smith-Hurd Supp.

1980-81); Ind. Code Ann. § 20-1-6-19 (Burns Supp. 1980); Iowa Code § 281.2 (1981); Kan. Stat. Ann. § 72-967(5) (1980); Ky. Rev. Stat. § 157.280 (Supp. 1980); La. Rev. Stat. Ann. § 17:1949 (West Supp. 1981); Me. Rev. Stat. tit. 20, § 3125(2) (Supp. 1980); Md. Educ. Code Ann. § 8-409 (Supp. 1980); Minn. Stat. § 120.17(2)(h) (1980); Mo. Ann. Stat. § 162.750 (Vernon Supp. 1981); Mont. Rev. Codes Ann. § 20-7-423 (1979); Neb. Rev. Stat. §§ 43-642 and 43-645(5) (1978 & Supp. 1979 & 1980); Nev. Rev. Stat. § 395.010 (1979); N.H. Rev. Stat. Ann. § 185-A:7 (1977); N.J. Stat. Ann. § 18A:46-14(g) (West Supp. 1981); N.M. Stat. Ann. § 22-13-8 (Supp. 1980); N.Y. Educ. Law §§ 4401 (2)(e)-(h) and 4402(2) (McKinney Supp. 1980); N.C. Gen. Stat. § 115-377 (1978); N.D. Cent. Code § 15-59-07 (Supp. 1977); Okla. Stat. Ann.

tit. 70, §§ 13-101(3) (West Supp. 1980); Or. Rev. Stat. § 343.221(4) (1979); Pa. Stat. Ann. tit. 24, §§ 13-1372(3) and 1377 (Supp. 1981); R.I. Gen. Laws § 16-24-10 (1970); S.C. Code § 59-33-50 (1977); S.D. Compiled Laws Ann. § 13-37-7 (1975); Tenn. Code Ann. §§ 49-2902(f) and 49-2913(E) (1977); Tex. Educ. Code Ann. tit. 2, § 16.104(k) (Vernon Supp. 1980); Utah Code Ann. § 53-18-2 (1970); Vt. Stat. Ann. tit. 16, §2944(a) (Supp. 1980); Va. Code § 22.1-216 (1980); Wash. Rev. Code Ann. §§ 28A.13.030 and 28A.13.045 (Supp. 1980); Wis. Stat. Ann. § 115.83(1)(a)(2) (West Supp. 1980).